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In The

Supreme Court of the United States

CHARLES BROWN, *et al.*,

Petitioners,

v.

DAVID HOVATTER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Virtually alone among the states, Maryland forbids corporate ownership of funeral homes and allows only Maryland-licensed funeral directors to own funeral homes. Together, this functional residency requirement and corporate-ownership ban substantially burden the ability of national funeral chains and nonresident entrepreneurs to participate in the Maryland funeral market. The questions presented are:

1. Are commerce-burdening laws immune from challenge under the dormant Commerce Clause so long as they only restrict the interstate flow of capital rather than physical goods?

2. The balancing test established by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), requires courts to determine whether the burden on interstate commerce caused by a challenged regulation is clearly excessive in relation to its "putative local benefits." Must those benefits be real or will purely speculative benefits suffice?

PARTIES TO THE PROCEEDING

The Petitioners are Charles Brown, Joseph B. Jenkins, III, Brian Chisholm, and Gail Manuel.

The Respondents are the members of the Maryland State Board of Morticians, David Hovatter, Faye Patterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffrey Pope, and Vernon Strayhorn, in their official capacities.

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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing en banc without opinion. The panel decision of the court of appeals is reported at 561 F.3d 357 and is reprinted in the Appendix (App.) at 1-29. The decision of the District Court is reported at 516 F. Supp.2d 547 and is reprinted at App. 30-72.

JURISDICTION

The Court of Appeals denied the petition for rehearing en banc on April 24, 2009. On July 8, 2009, Chief Justice Roberts granted Petitioners' motion to extend the deadline for this Petition to August 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. App. 87. The challenged statute is the Maryland Morticians Act, Md. Health Occ. Code § 7-101 *et seq.*, the relevant portions of which are reproduced at App. 88-103.

STATEMENT

A. Factual Background

The facts of this case are simple, clear, and, with respect to the burdens on interstate commerce, undisputed. Petitioner Brian Chisholm is a Maryland-licensed funeral director who now lives in Celebration, Florida. He wants to invest financial and human capital into the Maryland funeral market and bring the profits back to his home in Florida. Like countless entrepreneurs across the country, Chisholm wants to engage in interstate commerce – putting his capital and talents to their most productive use where they will be most rewarded.

To accomplish this, Chisholm needs to do the one simple thing that makes complex interstate enterprises possible: form a corporation. As the evidence established, owning an interstate business as a corporation is a practical necessity in the funeral home context for the same reason it is a necessity in every other context. Corporations have advantageous attributes that direct personal ownership of a business cannot provide – perpetual existence, superior ability to raise capital, limited liability, ease of transferability, and others. The nation has a robust and integrated funeral home market because the ability to structure successful funeral home businesses as corporations allows them to grow and to serve customers across the country.

Maryland, however, has largely isolated itself from this interstate market by forbidding entrepreneurs like

Chisholm from owning funeral homes in Maryland as corporations. Md. Morticians Act, Health Occ. Code § 7-309(a) (hereafter "Morticians Act § 7-___"). App. 100-101. For all practical purposes, this nearly unique ban on corporate ownership[1] sets aside the Maryland funeral home market exclusively for Marylanders by requiring a prospective funeral home owner to do two things that will almost invariably require Maryland residency: (1) become a Maryland-licensed mortician (which requires not only two years of mortuary school but also a lengthy *in-state* apprenticeship[2]); and (2) own the desired Maryland funeral home in his or her personal capacity. *Id.* at § 7-310. App. 102-103 (providing that only a "licensed individual" – i.e., a Maryland-licensed mortician – may obtain the funeral establishment license needed to operate a funeral home).

Maryland does allow a small amount of interstate investment to seep into its domestic funeral home market through a provision in the Morticians Act that "grandfathered" 58 funeral homes that were

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[1] Only New Hampshire similarly prohibits corporations from owning funeral homes. N.H. Rev. Stat. Ann. § 325:15.

[2] *See* Morticians Act § 7-303 (qualifications for licensure). New morticians must serve an apprenticeship of at least one year and experienced morticians relocating from other states must serve a 1,000-hour apprenticeship. Morticians Act §§ 7-303(b)(2), 7-305(b)(3). App. 94-96. These apprenticeships must be served at a Maryland funeral home because the statute defines an "apprentice sponsor" as a Maryland-licensed mortician. *Id.* § 7-101(c)(1). App. 88.

operating as corporations before 1945. Morticians Act §§ 7-309, 7-310(c)(2). App. 100-103. These corporate licenses are freely transferable, and they have become highly valuable because they represent the special privilege of operating a business as a corporation in an environment where most people cannot. App. 41-42.

These "grandfathered" corporate licenses represent the only way that nonresidents, including the major national funeral chains, may participate in the otherwise closed Maryland funeral home market. National chains have acquired 30 of the 58 grandfathered corporate funeral homes, meaning that only 30 of Maryland's roughly 270 funeral homes are owned by out-of-state enterprises, while the rest remain in the hands of local owners. Professor David Harrington, the nation's leading funeral industry economist, confirmed the startling degree to which Maryland has sealed itself off from the national funeral home market by offering unrebutted testimony that the rate of investment in Maryland by national funeral chains is drastically lower than it is in other states.

And that is precisely the point. The Respondents themselves acknowledged in the proceedings below that Maryland's restrictions on corporate ownership "have prevented the [domestic] funeral industry from becoming as saturated by national chains as the rest of the national funeral market." They also quoted approvingly a letter from the chief lobbyist for the Maryland State Funeral Directors Association, Jim Doyle, in which he observed that "[t]he potential

expansion of national conglomerates . . . has also undoubtedly played a substantial role" in the legislature's refusal to eliminate the corporate ownership ban. Mr. Doyle also testified that:

- The ownership ban "places a check on the ability of . . . publicly traded corporations . . . to thrive or spread in Maryland"; and
- Legislators resisted efforts to amend the law because they "were concerned about what would happen if the conglomerates were given a green light to simply be able to move into Maryland."

Respondent Gladys Sewell, a fourth-generation Maryland-licensed mortician, testified that the corporate prohibition is valuable precisely because it protects her from having to compete with the national funeral chains. As a result of these and other admissions, the district court correctly concluded that "the Maryland funeral home industry has benefitted from the most blatantly anticompetitive state funeral home regulation in the nation." App. 68.

B. Proceedings Below

Petitioners filed suit in 2006 under 42 U.S.C. § 1983 alleging that Maryland's restrictions on funeral home ownership by corporations violate the dormant Commerce Clause. Specifically, Petitioners argued that the Maryland Morticians Act: (1) discriminates against interstate commerce in practical

effect; and (2) fails the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because the burdens on interstate commerce are enormous and the local benefits literally nonexistent.

On cross-motions for summary judgment, the District Court ruled that Maryland's corporate ownership ban violates the dormant Commerce Clause because it "severely limits the ability of out-of-state businesses from opening a funeral home in Maryland." App. 69. Characterizing the state's claims of consumer protection as "no more than entirely speculative," App. 65-66 (internal quotations and citation omitted), the Court held that the corporate ownership ban's burdens on interstate commerce were "intolerable and clearly excessive in relation to any benefits proffered by the [Respondents]." App. 69.

The Fourth Circuit reversed. Judges Niemeyer and Traxler ruled as a matter of law that this case does not even implicate the dormant Commerce Clause. In their view, Maryland's restrictions on funeral home ownership by corporations constitute only "local regulation of a localized profession where services are performed for clients entirely in Maryland." App. 21. The fact that the challenged restrictions indisputably limit the ability of non-resident entrepreneurs like Petitioner Chisholm to invest capital and expertise into the Maryland funeral market – and obtain profits in return – was irrelevant, they said, because the Morticians Act "is not aimed at any interstate flow of goods, materials, or other articles of commerce," which, according to

Judges Niemeyer and Traxler, is all the dormant Commerce Clause protects. *Id.* ("Because the Morticians Act does not place a barrier or burden on the flow of interstate commerce, it does not violate the dormant Commerce Clause.")

Then, in the only portion of the opinion that Judge Shedd joined, the panel performed a perfunctory *Pike* analysis, holding that even if the dormant Commerce Clause did apply, the Petitioners could not prevail because the burdens on interstate commerce from prohibiting corporate funeral home ownership are not clearly excessive when weighed against the entirely speculative benefits of: (1) greater accountability to government regulators; and (2) encouraging familiarity with the day-to-day workings of the funeral business. App. 23-24.

The Petitioners sought rehearing en banc on the grounds that the panel's holding that the interstate movement of investment capital, expertise, and profits are not protected by the dormant Commerce Clause directly conflicts with rulings of this Court and because the panel's acceptance of illusory local benefits for which there was no supporting evidence directly conflicted with Fourth Circuit precedent and with this Court's application of *Pike* balancing. The petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS REQUIRED BECAUSE THE FOURTH CIRCUIT DRASTICALLY NARROWED THE SCOPE OF THE DORMANT COMMERCE CLAUSE, CAUSING A SPLIT OF AUTHORITY AND CREATING A BLUEPRINT FOR ECONOMIC PROTECTIONISM.

The record in this case is clear: the Maryland funeral industry has been caught red-handed advancing the parochial interests of its members at the expense of the national market in funeral services. The undisputed record evidence – and indeed the admissions of the Respondents themselves in the proceedings below – make clear that Maryland maintains its virtually unique restrictions on corporate ownership of funeral homes in order to limit the ability of nonresidents to invest in and derive profits from the local funeral industry. As uncontroverted expert testimony from the nation's leading funeral economist made clear, that effort has been quite successful, rendering Maryland a virtual island in the national stream of funeral commerce.

But instead of squarely confronting that fact, the Fourth Circuit narrowed the dormant Commerce Clause in two distinct ways. First, the court of appeals held that the dormant Commerce Clause does not even apply to the challenged restrictions because limiting the ability of nonresidents to own funeral homes in Maryland does not affect the "*flow of interstate commerce* – the flow of goods, materials, and other articles of commerce across state lines."

App. 15 (emphasis in original). According to the Fourth Circuit's holding below, the dormant Commerce Clause is triggered only when a statute is "aimed at the interstate flow of goods, materials, or articles of commerce," such as the motorcycles at issue in the most recent – and relevant – Fourth Circuit precedent. App. 21 (citing *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005)). Second, the Fourth Circuit also narrowed the dormant Commerce Clause by holding that it does not apply when the challenged restrictions involve the structure or method of doing business, such as operating a funeral home as a corporation. App. 17-18 (holding that "the matter of which the [Petitioners] complain – the manner of professional practice in Maryland – are not matters protected by the dormant Commerce Clause").

This sort of formalism has no place in dormant Commerce Clause analysis, particularly given this Court's oft-repeated admonition that "[t]he principal focus of inquiry must be the *practical operation* of the statute." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). By restricting the dormant Commerce Clause to physical articles of commerce, App. 17, and insulating from review demonstrably protectionist state laws involving corporate ownership of ordinary businesses, App. 17-18, the Fourth Circuit severely curtailed the scope of the dormant Commerce Clause. In doing so, the court created a split of authority with grave implications for the national common market.

A. The Fourth Circuit's Holding That Investment Capital, Profits, And Professional Expertise Are Not Articles Of Commerce Directly Conflicts With Decisions Of This Court And Other Circuits.

The Fourth Circuit's primary holding in the decision below was that the "Maryland Morticians Act does not place a barrier or burden on the flow of interstate commerce" because the statute "is not aimed at any interstate flow of goods, materials, or articles of commerce." App. 21. In an opinion for the panel joined only by Judge Traxler, Judge Niemeyer ruled in effect that intangible articles of commerce such as investment capital and business expertise are not articles of commerce at all. Quoting this Court's decision in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976), Judge Niemeyer suggested that the dormant Commerce Clause is so narrow that it applies only to the interstate movement of "raw materials and finished goods." App. 15-16 (internal quotations omitted).

Judge Niemeyer's opinion is in direct conflict with *Lewis*, *supra*, which invalidated a Florida banking statute that prohibited out-of-state banks from establishing bank-holding companies in Florida to offer investment advice to Floridians. 447 U.S. at 38-39. Although *Lewis* did not expressly hold that interstate investment capital and professional expertise are articles of commerce, that was a necessary premise of its holding.

The Fourth Circuit's elevation of form over substance – by holding that the movement of investment capital and profits across state lines is not interstate commerce – is fundamentally inconsistent with *Lewis*. It is also inconsistent with the holdings of cases in other circuits that the dormant Commerce Clause protects not merely the interstate movement of physical goods, but also the ability of nonresidents to invest in local markets.[3] Because the Fourth Circuit's unduly narrow view of the dormant Commerce Clause

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[3] *See Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-47 (11th Cir. 2008) (holding that a village zoning provision that effectively precluded any new interstate chain retailer from establishing a store in the village had the practical effect of discriminating against interstate commerce and violated the dormant Commerce Clause); *Jones v. Gale*, 470 F.3d 1261, 1264-65 (8th Cir. 2006) (striking down on dormant Commerce Clause grounds a law that prohibited corporate ownership of farms in Nebraska); *Walgreen Co. v. Rullan*, 405 F.3d 50, 57-58 & n.5 (1st Cir. 2005) (holding that a Puerto Rico law that limited the ability of nonresidents to own local pharmacies burdens interstate commerce sufficiently to trigger dormant Commerce Clause scrutiny despite the fact the law did not regulate the flow of actual physical goods into Puerto Rico); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 914 (7th Cir. 2003) (holding that the opportunity for nonresidents to invest in local utility companies constitutes an "article of interstate commerce" under the dormant Commerce Clause); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (striking down on dormant Commerce Clause grounds provisions of the Texas Alcoholic Beverage Code that prohibited nonresidents from obtaining permits to operate in-state alcoholic beverage enterprises and from obtaining majority ownership of corporations possessing such permits).

is explicitly grounded in a subsidiary line of this Court's jurisprudence starting with *Hughes*, review is necessary to prevent the Fourth Circuit decision from becoming a blueprint for economic protectionism – one ostensibly approved by this Court.[4]

B. There Is A Split Of Authority On Whether The Dormant Commerce Clause Reaches State Regulation Of The Form Of Doing Business Such As The Use Of Corporations.

Granting review to clarify what constitutes an "article of commerce" would also provide the Court with the opportunity to clarify its holding in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which has been a source of great confusion in the case

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[4] The Fourth Circuit opinion also conflicts with decisions of this Court holding that the negative and affirmative Commerce Clauses are equal in scope. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (compiling cases). By concluding that the dormant commerce power does not apply because "the Maryland Morticians Act is a local regulation of a localized profession where services are performed for clients entirely in Maryland," 561 F.3d at 366-67, the Fourth Circuit implicitly concluded that Congress lacks the authority under its affirmative commerce power to regulate the local funeral home industry. While that is consistent with the original, and what many would regard as proper, understanding of the affirmative commerce power, it is inconsistent with this Court's jurisprudence and inconsistent with federal regulations such as the Federal Trade Commission's "Funeral Rule," 16 C.F.R. § 453.1, *et seq.*, which minutely regulates how funeral establishments interact with their customers.

law, as the decision below illustrates. Citing *Exxon*, the Fourth Circuit held that "the matters of which [Petitioners] complain – the manner of professional practice in Maryland – are not matters protected by the dormant Commerce Clause." App. 17-18. The Fourth Circuit's opinion, in other words, categorically places state restrictions on the use of corporations beyond the scope of the dormant Commerce Clause, a rule that would have disastrous consequences for national markets if widely accepted.

But *Exxon* plainly does not stand for the proposition that state regulation of the form of doing business, such as restrictions on the use of corporations in certain industries, can *never* violate the dormant Commerce Clause. Its holding is far more prosaic. In *Exxon*, Maryland forbade vertical integration in the petroleum industry, which required oil refiners with retail gas stations to shut down their gas stations in Maryland. 437 U.S. at 121. The oil refiners proved that the challenged statute would force them out of the local retail gas market, but did not prove that less gasoline would flow into Maryland as a result. *Id.* at 123, 127-28. In other words, the refiners established only an individual impact, rather than an injury to the interstate market. This Court, therefore, held that they had not established a violation of the dormant Commerce Clause because the Clause protects interstate markets, not market participants.

Exxon's unremarkable holding – that the dormant Commerce Clause requires proof of an actual

burden on interstate commerce – is being dangerously transformed. Thus, in *CTS Corp. v. Dynamics Corp. of America*, this Court invoked *Exxon* in holding that state regulation of tender offers for state corporations was essentially immune from dormant Commerce Clause review because the Clause does not reach state regulation of the form or structure of doing business. 481 U.S. 69, 90-94 (1987). *CTS*, in other words, treated *Exxon* as though it stands for something much larger than it does; namely, that state regulation of the form or structure of doing business is necessarily outside the scope of the dormant Commerce Clause in all cases.

The Court's later view of *Exxon*, as expressed in *CTS*, has been a source of significant confusion among the lower courts. For example, the Fourth Circuit seems to have understood *Exxon* as standing for the proposition that no matter how substantial the burden on interstate commerce, and no matter how invidious a state's motives might be, so long as the state is regulating only the form of business, it is effectively immune from dormant Commerce Clause challenge. The Third and Fifth Circuits have also indicated that *Exxon* stands for the proposition that state restrictions on the form of doing business are beyond the reach of the dormant Commerce Clause.[5]

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[5] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001) (car manufacturers forbidden from owning car dealerships) (quoting *Exxon*, 437 U.S. at 127); *Ford Motor Co. v.*

(Continued on following page)

Other courts, for the time being at least, hew to a generally proper reading of the case.[6]

C. The Split Of Authority On The Scope Of The Dormant Commerce Clause Has Grave Implications For The National Economy.

The purpose of the Commerce Clause is to ensure a common national market. As the Court's decisions have long recognized, the thirteen former colonies were untenable as a nation under the Articles of Confederation because, with the dissipation of the British threat, the unity of the revolutionary era gave way to ever-multiplying trade barriers. *See, e.g.*, *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949) (examining historical basis of Commerce Clause). The Constitution, and the Commerce Clause in particular, were the Founders' solution to the atomizing effect of state economic protectionism. *Id.* Accordingly, the Commerce Clause has always been understood to have a negative aspect that protects the access of all citizens to the domestic markets of every state.

Muir, 874 F.2d 926, 944-45 (3d Cir. 1989) (insurance companies may not affiliate with savings and loans).

[6] *E.g.*, *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 450-451 (6th Cir. 2009); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 23-24 (10th Cir. 2009); *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992).

By narrowing the scope of the dormant Commerce Clause on the basis of tensions within this Court's jurisprudence, the Fourth Circuit's opinion presents a serious danger to the national common market. Thus, states in the Fourth Circuit, along with industry groups like the Maryland State Funeral Directors Association, can now favor local economic interests at the expense of nonresidents with impunity so long as barriers to interstate commerce only affect intangibles such as investment capital or the form of doing business.

Such economic protectionism will be nearly impossible to stop because legislatures and industry groups will adorn their activities with the necessary fig leaf of legitimacy. If the Fourth Circuit's holding stands, states will be able to disguise their economic protectionism as long as local interests are willing to tolerate a few inconveniences, like the inability to operate certain businesses as corporations, to enjoy the benefits of a restricted market. By restricting corporate ownership, states could shield local businesses from virtually every national-level enterprise. For instance, if local businesses suddenly decided they did not wish to compete with McDonald's, or Starbucks, or Best Buy, they need only persuade the legislature to enact for them the exact same corporate ownership ban that Maryland has for funeral homes. But allowing that would produce precisely the sort of "Balkanization" the Commerce Clause was intended to prevent.

II. THE DECISION BELOW EXACERBATED AN ACUTE AND GROWING SPLIT AMONG THE CIRCUITS CONCERNING THE "LOCAL BENEFITS" ELEMENT OF THE *PIKE* TEST.

A state law that burdens interstate commerce without overt discrimination is evaluated under the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That test asks whether the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Id.* at 142. The circuits are sharply divided on a simple but fundamental question: must the local benefits be real, or will purely speculative benefits suffice?

The Court has never resolved that question, and the result has been a growing split, with four circuits on one side, four on the other, and three that appear to vacillate. The lower courts need guidance, and this Court will eventually have to provide it. Further delay will only lead to more inconsistent results.

A. How Much Deference A State's Assertion Of Local Benefits Should Receive Under *Pike* Remains Unclear.

The *Pike* test contains an inherent tension concerning the issue of local benefits. That tension has never been resolved, and, as documented below, it has caused a pronounced split among the circuits. This case presents an opportunity to reduce the tension – and bring greater consistency to circuit law

– by indicating whether courts should automatically defer to a state's assertion of a local benefit or require at least some proof that it exists.

Pike requires courts to determine whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. But there is an inherent tension between the terms "clearly excessive" and "putative." "Excessive" indicates comparison, and, particularly when coupled with "clearly," implies some actual, quantitative analysis. By contrast, the word "putative" means "supposed, believed, reputed." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 721 (2d ed. 1995). It is a term of supposition, of conjecture. Thus, *Pike* itself sends mixed signals concerning the parties' respective burdens in challenging and defending commerce-burdening laws.

Two conflicting lines of authority have emerged. One line requires proof that the asserted local benefits be both genuine and "credibly advanced" by the commerce-burdening regulation. The other requires no evidence and will instead accept any "rational" assertion of benefit by the state. Naturally, those approaches yield different results, which means that a regulation with no demonstrable local benefits – like the one at issue here – will be upheld in some circuits, struck down in others, and a toss-up in the rest.

The divergent lines of authority may be traced to this Court's fractured decision in *Kassel v.*

Consolidated Freightways Corp., 450 U.S. 662 (1981). For purposes of this petition, *Kassel* is more important for the basic point on which the Justices agreed than on their various disagreements, involving how much deference the courts should give to a state's justifications for commerce-burdening regulations. The point on which all three opinions appear to have agreed was that the local benefits asserted in support of a commerce-burdening law should be real and not merely speculative. Simply reaffirming that principle – from which a number of circuits have strayed with no explicit warrant from this Court – would substantially clarify the *Pike* test and harmonize, at least to a degree, the decisional law in the circuits.

Kassel involved a dormant Commerce Clause challenge to an Iowa law that restricted the use of 65-foot double tractor trailers within the state. *Id.* at 665. Recognizing the special deference normally accorded to matters of traditionally local concern like highway safety, Justice Powell, in a plurality opinion joined by Justices Stevens, Blackmun, and White, nevertheless concluded that the truck-length restrictions "unconstitutionally burden interstate commerce." *Id.* at 671. In reaching that conclusion, the plurality considered the competing evidence offered by the parties and concluded that the asserted safety interest was "illusory," *id.*, and that the state had imposed a substantial burden on interstate commerce "without any significant countervailing safety interest." *Id.* at 678.

Justice Brennan wrote a concurring opinion joined by Justice Marshall in which he argued that it was clear Iowa had adopted the truck-length restriction for the improper purpose of promoting the interests of Iowa residents at the expense of neighboring states. *Id.* at 687 (Brennan, J., concurring in judgment). Justice Brennan emphasized his view that the relevant inquiry is the legislature's *actual* purpose in passing the law, *id.* at 680-81, and when that purpose is apparent – as he believed it was in *Kassel* – then courts should not consider *post hoc* justifications. *Id.* at 682.

Justice Rehnquist, joined by the Chief Justice and Justice Stewart, dissented. Unlike the concurring Justices, he did not believe the restriction was motivated by an improper purpose, *id.* at 705, and, unlike the plurality, he concluded that "there was sufficient evidence presented at trial to support the legislative determination that [truck] length is related to safety. . . ." *Id.* at 696.

The point on which all three opinions appear to agree is that the "local benefits" asserted by the state in justifying its commerce-burdening restrictions must be real and must find at least some support in the evidentiary record. *Compare id.* at 671-74 (plurality opinion) (assessing evidentiary record); *with id.* at 686 (concurring opinion) (court will not second-guess legislature so long as safety justifications are not "illusory") *and id.* at 693-96 (dissenting opinion) (reviewing trial record and finding "sufficient evidence" to support safety justification). Indeed, even

writing in dissent, Justice Rehnquist emphasized three separate times that the relevant question is whether the local benefits from a challenged regulation are so "slight or problematical" as to undercut the state's asserted justifications. *Id.* at 692, 696, 698. The only way to make that determination, of course, is to consider the actual evidence, if any, of local benefits, as both the plurality and dissenting opinions did in *Kassel*.

This Court has not deviated from *Kassel*'s teaching that local benefits must be supported with evidence that is neither "illusory," *id.* at 671, 686, nor "pretext[ual]," *id.* at 692, nor "slight or problematical." *Id.* Nevertheless, a line of cases has developed in the circuits in which courts will accept purely speculative local benefits unsupported by any evidence – something this Court has never approved and that cannot be reconciled with *Kassel* or with any of the Court's subsequent *Pike* cases.

B. There Is Disarray Among And Within The Circuits As To Whether Local Benefits Must Be Proven Or Merely Asserted.

The circuits are profoundly divided over a simple question in applying the *Pike* test: whether states must demonstrate the existence of actual local benefits, or whether they may rely instead on raw assertions, as Maryland did in this case. The disarray is further accentuated by the existence of several intracircuit splits, including one in the Fourth Circuit

caused by the decision below. The question is one of profound importance because it is difficult to imagine any regulation for which some merely "putative" local benefit cannot at least be hypothesized. And if that is all that is required to immunize a commerce-burdening regulation – as it now appears to be in at least four circuits – then the *Pike* test will cease to be a test in any meaningful sense of the word. If that is the Court's intention, then perhaps it would be best to say so explicitly. If that is not the Court's intention, then lower courts should know that as well.

The fundamental point of disagreement among – and in some cases within – the circuits is whether evidence matters when it comes to the "putative local benefits" prong of the *Pike* test. The circuits may be grouped as follows:

I.	No evidence required:	1st, 5th, 9th, and D.C.
II.	Evidence required:	2d, 3d, 8th, and 10th
III.	Intracircuit splits:	4th, 6th, and 7th

Those groupings are explained below and are represented graphically in the following chart on the next page.

ACTUAL EVIDENCE REQUIRED

2ND

- *Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602 (1996)
- *Southaid v. E. Hampton*, 477 F.3d 38 (2007)

3RD

- *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* 298 F.3d 201 (2002)
- *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (2008)

8TH

- *Burlington N. R.R. Co. v. Neb.* 802 F.2d 954 (1986)
- *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (2000)
- *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (2002)

10TH

- *ACLU v. Johnson*, 194 F.3d 1149 (1999)
- *Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1496 (1994)

NO EVIDENCE / "RATIONAL JUSTIFICATION"

- *Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099 (1997)
- *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780 (1997)

4TH

- *Medigen of Ky., Inc. v. Pub. Serv. Comm'n of W.Va.*, 985 F.2d 164 (1993)
- *Psinet, Inc. v. Chapman*, 362 F.3d 227 (2004)
- *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (2005)
- *Brown v. Hovatter* 561 F.3d 357 (2009)

6TH

- *ANR Pipeline Co. v. Schriedewind*, 801 F.2d 228 (1986)
- *Interstate Towing Ass'n Inc. v. City of Cincinnati*, 6 F.3d 1154 (1993)
- *Reynolds v. Buchholzer* 87 F.3d 827 (1997)
- *McNeilus Truck & Mfg., Inc. v. Ohio ex rel Montgomery* 226 F.3d 429 (2000)

7TH

- *Amanda Acquisition Corp. v. Universal Food Corp.*, 877 F.2d 496 (1989)
- *Gov't Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267 (1992)
- *K-S Pharm., Inc. v. Am. Home Prod. Corp.*, 962 F.2d 728 (1992)
- *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124 (1995)
- *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (2005)
- *Cave Int'l, Inc. v. Madigan*, 500 F.3d 551 (2007)
- *Wesmueller v. Kostbade*, 571 F.3d 699 (2009)

1ST

- *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (2005)

5TH

- *Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (1980)
- *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (2001)
- *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717 (2004)
- *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (2007)

9TH

- *Spokle v. Mont.*, 411 F.3d 1051 (2005)

D.C.

- *Electrolert Corp. v. Barry*, 737 F.2d 110 (1984)

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1. No evidence required: 1st, 5th, 9th, and D.C.

The spirit of the no-evidence approach is aptly summarized in the First Circuit's observation that "under *Pike*, it is the *putative* local benefits that matter. It matters not whether these benefits actually come into being at the end of the day." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005). Similarly, while it once required evidence that the challenged restriction actually produce the asserted local benefits,[7] the Fifth Circuit has since adopted a more deferential standard akin to rational basis review. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007) (explaining that "we credit a putative local benefit 'so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes'") (quoting *Kassel*, 450 U.S. 662, 680-81 (Brennan, J., concurring)).[8]

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[7] *See Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75-76 (5th Cir. 1980) (explaining that under *Pike* "a court must examine the benefits that supposedly result from the local law, and not rely merely on the assertion of an accepted local interest" that is "illusory").

[8] *See also Int'l Truck and Engine Corp. v. Bray*, 372 F.3d 717, 728 (5th Cir. 2004) (same); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503-04 (5th Cir. 2001) (citing *Kassel* concurrence for proposition that it is not for courts to decide whether challenged regulation "in fact" promotes the stated purpose and concluding that there was "evidence from which a reasonable legislator could believe" that the benefits would result).

The Ninth Circuit has also adopted what amounts to a rational basis standard in applying the *Pike* test, invoking *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) for the proposition "states 'are not required to convince the courts of the correctness of their judgments.'" *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005).[9] Finally, while the D.C. Circuit has had little occasion to consider the issue, it too has adopted the no-evidence approach. Indeed, in the one *Pike* case that research revealed, it appears that the plaintiffs challenging Washington, D.C.'s ban on the possession of radar detectors were not even permitted to introduce evidence to support their claim that the ban would be ineffective in reducing speeding. *Electrolert Corp. v. Barry*, 737 F.2d 110, 112 (D.C. Cir. 1984). The court upheld the law on the grounds that the government's safety rationale was not "'illusory'" or "'nonexistent,'" apparently in the absence of any evidence that the ban actually promoted that interest as a matter of fact. *Id.* at 113.

2. Evidence required: 2d, 3d, 8th, and 10th.

The Second Circuit explicitly requires actual evidence of local benefits in *Pike* cases. In fact, in a

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[9] *Clover Leaf Creamery* involved both equal protection and dormant Commerce Clause claims. The quoted passage comes from the portion of the opinion dealing with equal protection under the rational basis standard. 449 U.S. at 464.

recent decision remanding a case to the district court, the panel specifically noted conflicting expert testimony in the proceedings below and pointed out that "[i]n applying the Pike balancing test, the District Court did not refer to the conflicts in these expert affidavits or engage in any meaningful examination of the claimed local benefits conferred by the [challenged] Ferry Law." *Southold v. E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007). The panel observed that on the basis of the summary judgment record before the district court, "a reasonable fact finder could conclude that the Ferry Law *does not actually produce any of its intended benefits* so as to justify the potential burden on interstate commerce." *Id.* (emphasis added).[10]

The Eighth Circuit also requires evidence of actual local benefits. For example, *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), involved a Missouri law requiring propane suppliers to maintain a minimum storage capacity of 18,000 gallons. *Id.* at 733. The state characterized the regulation as a public health and safety measure designed to protect people who rely on propane to heat their homes from shortages. *Id.* at 735. But the

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[10] *See also Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 612-13 (2nd Cir. 1996) (reversing grant of summary judgment upholding New York law requiring certain disclosures about automobile bumpers and noting that "the validity of the legislative assumption . . . is debatable" and that conflicting evidence "reveal[s] substantial questions as to whether in fact significant benefits are created" by the statute).

Eighth Circuit rejected that argument on the grounds that "the local benefit *actually derived* from the statute is minimal or nonexistent." *Id.* at 735 (emphasis added). That conclusion was based in part on the fact that the state "presented no evidence" that existing propane storage capacities were insufficient. *Id.*[11]

The Tenth Circuit requires evidence of actual local benefits too. Thus, in upholding the preliminary injunction of a New Mexico law regulating speech on the Internet in *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999), the court acknowledged New Mexico's compelling interest in protecting minors from sexually explicit materials, but found that the "local benefits" of the restriction were "not huge," that enforcement of the law "is beset with practical difficulties," and that the "actual benefit" of the law would be extremely small.[12]

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[11] *See also U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1070-71 (8th Cir. 2000) (striking down local waste ordinance where the alleged benefits of the statute were "sheer speculation"); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986) (observing that it would not be difficult to imagine a nondiscriminatory, commerce-burdening regulation "that advances some legitimate safety objective only slightly, yet imposes massive burdens on interstate commerce").

[12] *See also Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (remanding case involving challenge to hazardous waste ordinance and noting the absence of evidence in the record concerning whether the ordinance addressed any "significant health or safety hazard," as well as no evidence whether the

(Continued on following page)

While the Third Circuit was initially more deferential,[13] its more recent rulings place it within the pro-evidence camp as well. Thus, in *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (3d Cir. 2008), the Third Circuit mirrored the approach of the Second Circuit in *Southold*, *supra*, remanding when the factual record was insufficient. As the panel explained, "the record is incomplete regarding the burden on interstate commerce and, *more importantly, the putative local benefits*." *Id.* at 252 (emphasis added).[14]

Finally, the Eleventh Circuit does not appear to have had a *Pike* case in which the outcome turned on the existence or nonexistence of local benefits. But the court did strike down a county landfill restriction based on its conclusion that the county could have achieved its public welfare objectives "'as well with a lesser impact on interstate activities.'" *Diamond*

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restriction was "reasonably related" to any such hazards, and no evidence whether the county's interest could be advanced as well with a lesser impact on commerce).

[13] *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780, 788-89 (3d Cir. 1999) (upholding New Jersey securities law on the basis of admittedly speculative future harms); *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1109-10 (3d Cir. 1997) (asserted benefits "rationally related" to challenged restriction).

[14] *See also Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (explaining that the government defendants could not "simply rely on the Milk Law's stated purpose. They must provide evidence that the wholesale price floors have the benefits contemplated by the General Assembly.").

Waste, Inc. v. Monroe County, 939 F.2d 941, 945 (11th Cir. 1991) (quoting *Pike*, 397 U.S. at 142). That approach seems more in keeping with the ethic of circuits that require some evidence of actual local benefits.

3. Intracircuit splits: 4th, 6th, and 7th.

The Fourth, Sixth, and Seventh Circuits all have conflicting decisions from which it is difficult to extract a consistent principle or trend.

While the Seventh Circuit's tone in applying *Pike* is consistently deferential,[15] the decisions themselves are more nuanced. For example, Judge Posner recently wrote an opinion reinstating a dormant Commerce Clause challenge to a Wisconsin law that allows graduates of Wisconsin law schools – but not

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[15] *See, e.g.*, *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007) (expressing doubt whether *Pike* balancing is available to plaintiffs without showing of at least "mild" discrimination against interstate commerce); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) (citing *Amanda Acquisition*, *infra*, for proposition that "the dormant commerce clause does not replace the rational-basis inquiry with a broader, all-weather, be-reasonable vision of the Constitution") (internal quotations and citations omitted); *K-S Pharm., Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir. 1992) (arguing that "dormant commerce clause does not call for proof of a law's benefits" when the subject of the challenged law is trade); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989) (arguing that *Pike* test may actually be concerned only with discrimination and not "baleful effects").

schools in other states – to be admitted to practice law in Wisconsin without passing the state bar. *Wiesmueller v. Kosubucki*, 571 F.3d 699, 701 (7th Cir. 2009). Finding no overt discrimination, the panel sought to apply *Pike* balancing but found that it could not because of the "evidentiary vacuum" created by the early dismissal of the case. *Id.* at 704. The panel reasoned that Wisconsin's diploma privilege would only make sense if Wisconsin law were in fact a greater part of the curriculum of the two accredited Wisconsin law schools (Marquette and Madison) than it is of various out-of-state law schools like Harvard or Yale. *Id.* Recognizing that the law's actual effects on commerce might well be small, the panel noted that not much would be required to justify it, but explained that "[o]ur concern is that there may be nothing at all to justify it." *Id.* at 705.

Thus, in *Wiesmueller* at least, evidence regarding the actual existence or non-existence of local benefits mattered. Otherwise, the panel could simply have *assumed* that Wisconsin law schools are more likely than others to teach Wisconsin law (or, more to the point, the panel could have assumed that the *legislature* had made such an assumption). That certainly seems to be what the First, Fifth, Ninth, and D.C. Circuits would have done, and yet the Seventh did not: it remanded the case to the district court because "the plaintiffs were denied an opportunity to try to prove their case" – presumably with evidence that the challenged law did not in fact

produce the putative local benefits asserted by the state. *Id.* at 707.[16]

The Sixth Circuit's application of *Pike* is similarly unsettled,[17] and the Fourth Circuit, though previously consistent in requiring at least some evidence of local benefits,[18] now has an intracircuit split as a result of

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[16] *See also Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 663 (7th Cir. 1995) (finding Wisconsin recycling statute impermissibly discriminatory but also noting that the law could not pass muster under *Pike* because the state had not "demonstrated" the need to pursue its environmental policies in the manner that it did); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1286 (7th Cir. 1992) (rejecting discriminatory Indiana waste disposal statutes and noting that they also flunked the *Pike* test because the statutes "will further their stated purposes only marginally").

[17] *Compare McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000) (striking down "protectionist" Ohio vehicle manufacturer licensing law and finding that it also failed *Pike* balancing due to "lack of any significant local benefit") *and ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 237 (6th Cir. 1986) (striking down Michigan utility law because "[a]n analysis of the alleged benefits reveals that they do not further important state interests") *with Reynolds v. Buchholzer*, 87 F.3d 827, 831 & n.4 (6th Cir. 1997) (refusing to consider plaintiffs' arguments that original purpose of fishing restrictions was "no longer viable" and observing that "[t]his question is better submitted to the legislature") *and Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154 (6th Cir. 1993) (upholding Cincinnati towing ordinance on the basis of an assumption that asserted benefits would arise, but without actual evidence).

[18] *See Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (rejecting Virginia law prohibiting dissemination of material harmful to minors over the Internet where asserted local benefits, though compelling, "have not been proven"); *Medigen of*

(Continued on following page)

the decision below upholding a law, apparently for the first time in the Fourth Circuit, for which the asserted local benefits were "no more than 'entirely speculative.'" App. 65-66 (district court quoting *Medigen*, 985 F.2d at 167).

C. Confirming That States Must Provide Some Evidence Of Actual Local Benefits Would Restore A Significant Measure Of Consistency To The Lower Courts' Application Of *Pike*.

This Court has never squarely addressed whether the "putative local benefits" element of the *Pike* test requires actual evidence or may instead be satisfied with "rational" speculation. Although the Court reached an implicit consensus on that point in *Kassel*, the absence of more specific guidance has engendered a profound split among and within the circuits.

Such differing standards threaten the unity of the nation's common market, which it is the purpose of the dormant Commerce Clause to protect. The Court will eventually need to resolve that split, and this case is a good place to start.

Ky., Inc. v. Pub Serv. Comm'n of W. Va., 985 F.2d 164, 167 (4th Cir. 1993) (striking down medical waste hauling restriction where asserted local benefits were "entirely speculative").

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES BROWN; JOSEPH B. JENKINS, III; BRIAN CHISHOLM; GAIL MANUEL, Plaintiffs-Appellants, v. DAVID HOVATTER; FAYE PETERSON; MICHAEL RUCK, SR.; GLADYS SEWELL; DONALD V. BORGWARDT; MARSHALL JONES, JR.; MICHAEL KRUGER; BRIAN HAIGHT; ROBERT BRADSHAW; JEFFREY POPE; VERNON STRAYHORN, SR., in their official capacities as members of the Maryland State Board of Morticians, Defendants-Appellees.	No. 08-1121
CHARLES BROWN; JOSEPH B. JENKINS, III; BRIAN CHISHOLM; GAIL MANUEL, Plaintiffs-Appellees, v. DAVID HOVATTER; FAYE PETERSON; MICHAEL RUCK, SR.; GLADYS SEWELL; MARSHALL JONES, JR.; MICHAEL KRUGER; DONALD V. BORGWARDT; ROBERT BRADSHAW; JEFFREY POPE; BRIAN HAIGHT; VERNON STRAYHORN, SR., in their official capacities as	No. 08-1125

members of the Maryland State Board of Morticians,

Defendants-Appellants.

Appeals from the United States District Court for the District of Maryland, at Baltimore.

Richard D. Bennett, District Judge

(1:06-cv-00524-RDB)

(Filed Mar. 27, 2009)

Argued: January 27, 2009

Decided: March 27, 2009

Before NIEMEYER, TRAXLER, and SHEDD Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Traxler joined. Judge Shedd wrote a separate concurring opinion.

COUNSEL

ARGUED: Clark Neily, INSTITUTE FOR JUSTICE, Arlington, Virginia, for Appellants/Cross-Appellees. Steven Marshall Sullivan, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees/Cross-Appellants. **ON BRIEF:** William H. Mellor, Jeffrey T. Rowes, INSTITUTE FOR JUSTICE, Arlington, Virginia, for Appellants/Cross-Appellees. Douglas F. Gansler, Attorney General of Maryland, Kathleen A. Ellis, Assistant Attorney General, Grant D. Gerber,

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OPINION

NIEMEYER, Circuit Judge:

Charles Brown, Joseph Jenkins, Brian Chisholm, and Gail Manuel, who refer to themselves as "funeral and cemetery entrepreneurs," commenced this action to strike down as unconstitutional the Maryland Morticians and Funeral Directors Act (the "Morticians Act"), Md. Health Occ. Code § 7-101 *et seq.* They contend that the Act, insofar as it prohibits *corporate* ownership of mortician's licenses and funeral establishments (except for 58 corporations grandfathered into the Act in 1945) and *unlicensed individual* ownership of funeral establishments (except for surviving spouses and executors of licensed morticians), violates the Equal Protection Clause, the Due Process Clause, and the dormant Commerce Clause of the U.S. Constitution. They argue: "Effectively shielded from most out-of-state competition, Maryland funeral industry members profit handsomely from the most blatantly anti-competitive funeral regulation in the nation, [effectively] add[ing] nearly $800 to the cost of a funeral in Maryland." (Internal quotation marks and record references omitted). They claim that they are unable to participate equitably in Maryland's funeral industry because of Maryland's

anticompetitive restrictions on funeral establishment ownership.

The district court, ruling on motions for summary judgment, concluded that the Morticians Act did not violate either the Equal Protection Clause or the Due Process Clause, but that it did violate the dormant Commerce Clause. In support of its dormant Commerce Clause ruling, the court said that the Act's "corporate [ownership] prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland." The parties filed cross-appeals.

For the reasons that follow, we affirm the district court's conclusions with respect to the Equal Protection Clause and the Due Process Clause for substantially the same reasons given by the district court. And because Maryland's licensing requirements do not unjustifiably burden interstate commerce, we reverse the district court's dormant Commerce Clause ruling. At bottom, we conclude that the Morticians Act is constitutional as to each of the plaintiffs' challenges.

I

The Morticians Act requires individuals who wish to "practice mortuary science in [Maryland]," to be licensed by the Maryland State Board of Morticians. Md. Health Occ. Code § 7-301(a). To qualify for a license, an individual must be of good

moral character; must have completed an apprenticeship; must have a specified educational background; and must have passed national and Maryland examinations. *Id.* § 7-303(b).

The Act also requires any individual who owns a "funeral establishment" to license the establishment, *i.e.*, "building, structure, or premises from which the business of practicing mortuary science is conducted." *Id.* §§ 7-310, 7-101(h). Unlicensed individuals may not own a funeral establishment, except for spouses and executors of deceased licensed individuals. *Id.* §§ 7-310(c)(2), 7-308, 7-308.1.

Corporations, except those grandfathered in as of 1945, may not be licensed as morticians or funeral directors, *id.* § 7-309, and may not own a funeral establishment, *see id.* § 7-310. Under the grandfather clause, enacted in 1945, a corporation, that held a license on June 1, 1945, that has been continually renewed, may own and operate a funeral establishment and continue to do so as long as the corporation exists, provided that "any practice of mortuary science that is conducted for the corporation is practiced by a licensed individual." *Id.* § 7-309(b), (d). The parties agree that there are 58 corporations grandfathered under § 7-309(b), that are licensed to engage in the business or profession of "funeral directing or embalming," allowing them to own and operate funeral establishments, and the stock of these corporations is freely transferable by its owners. Currently, the stock of 3 of the 58 corporations remains in the hands of the original owners,

and the stock of 30 of those corporations is held by out-of-state public corporations and national chains. The plaintiffs claim that it can cost up to $250,000 to purchase the stock of a corporation grandfathered to hold a license.

The four plaintiffs wish to own and operate funeral establishments through the corporate form without being individually licensed. Brown is a Maryland resident who owns a cemetery in Hagerstown, Maryland, and who built a funeral home that is now operated by his son. Because Brown is not licensed under the Morticians Act, he cannot own the funeral home he built, but he would like to do so through a corporation.

Jenkins is a Maryland resident who is licensed as a mortician. He is the supervising mortician of a funeral establishment in Prince George's County, Maryland, which was built by his family. He indicates that he would like to own his own funeral establishment through a corporation. He asserts that he cannot afford to buy the stock of a grandfathered corporation that owns a license because the going rate is "up to $250,000."

Chisholm is a former Maryland resident who now resides in Florida. He is licensed by Maryland as a mortician and owns a licensed funeral establishment in Timonium, Maryland. Since relocating to Florida in 2005, he states that his business has been operated by a "subcontractor . . . as the supervising mortician."

He would like to expand his funeral business in Maryland as an "ordinary business corporation."

Manuel is a Maryland resident who, through a corporation, owns a cemetery in Waldorf, Maryland. Although she is not a licensed mortician, Manuel would like to own and operate, through a corporation, a funeral establishment on the grounds of her cemetery because "owning a business through a corporation is the best way to operate." She states, however, that her plans cannot include paying the "exorbitant price, as much as $250,000," for the stock of a grandfathered corporation.

In short, each of the plaintiffs wants to engage in the practice of mortuary science through a corporation, and two wish to do so without becoming individually licensed. Therefore each is challenging Maryland's right to bar corporations from being licensed as morticians and owning licensed funeral establishments and to require the owner of a funeral establishment to be a "licensed individual."

The plaintiffs commenced this action against the Maryland State Board of Morticians and Funeral Directors ("Maryland") to declare the restrictions unconstitutional and to enjoin their enforcement. In their complaint, the plaintiffs allege that they have been denied equal protection of the law, in violation of the Equal Protection Clause of the Fourteenth Amendment, because there is no rational reason why they are not permitted to own funeral homes either through a corporate form when grandfathered

corporations can do so or as unlicensed individuals when surviving spouses and executors can do so. They also contend that the Morticians Act denies them the right "to earn an honest living in the occupation of their choice by imposing restrictions on the ownership of funeral homes that are not rationally related to any legitimate public purpose," in violation of the Due Process Clause of the Fourteenth Amendment. Finally, they allege that but for Maryland's restrictions on corporate and unlicensed individual ownership of funeral homes, persons and companies outside of the State "would pursue funeral home business opportunities in Maryland that they are not currently pursuing because of the restriction[s]. This substantial barrier to entry into the Maryland funeral home industry imposes an undue burden on interstate commerce in comparison with the legitimate local interests protected by the law, which in fact are none" and that therefore the restrictions on corporate and unlicensed individual ownership violate the dormant Commerce Clause.

On cross-motions for summary judgment, the district court rejected the plaintiffs' challenges to the Morticians Act under the Equal Protection and Due Process Clauses, concluding that "the Maryland General Assembly could have rationally determined that the public's health, safety and welfare are furthered by requiring that a licensed mortician own the funeral home where mortuary science is practiced." The court, however, sustained the plaintiffs' challenge to the Act's corporate ownership prohibition under the

dormant Commerce Clause, concluding that it is "a protectionist piece of legislation" that is "clearly anti-competitive." The court reasoned:

> The corporate prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland. Even if one of the fifty-eight licenses does become available, a prospective out-of-state purchaser must pay an inflated price for the license. The undisputed record in this case indicates that these burdens are intolerable and clearly excessive in relation to any benefits proffered by [Maryland].

The district court also held that the Morticians Act's requirement that funeral establishments be owned by licensed individuals was not properly challenged under the dormant Commerce Clause and that Maryland could require corporations wishing to own funeral establishments to be themselves owned by licensed funeral directors or morticians.

The plaintiffs appeal from the portion of the district court's judgment upholding the Maryland Morticians Act against equal protection and due process challenges, as well as the court's refusal to consider the licensed individual ownership requirement under the dormant Commerce Clause. And Maryland appeals from the portion of the judgment ruling that the corporate ownership restriction of the Morticians Act violates the dormant Commerce Clause. Because the district court struck down the

Morticians Act under the dormant Commerce Clause, we begin our analysis by addressing that issue.

II

The plaintiffs claim the following to support their argument that the Morticians Act's restrictions on corporate and unlicensed individual ownership of funeral establishments violate the dormant Commerce Clause: (1) that as a result of the restrictions, "the rate of out-of-state investment in the Maryland funeral industry is significantly lower than it would be absent the challenged restrictions"; (2) that the restrictions effectively exclude out-of-state funeral industry entrepreneurs "from the Maryland funeral market, despite their strong desire to enter it," because "the only practical way for out-of-state investors to own funeral homes in Maryland is through corporate ownership"; and (3) that "Maryland funeral industry insiders fought indefatigably for over a decade to prevent the General Assembly from eliminating these restrictions that suppress competition and supply the industry [in Maryland] with windfall profits." They conclude that in these ways the restrictions "impose significant burdens on interstate commerce without any countervailing public benefits," in violation of the dormant Commerce Clause.

Maryland responds that the restrictions on corporate and unlicensed individual ownership do not burden interstate commerce, "even if [they] result[ ] in greater costs or inefficiencies for certain companies."

It notes that "differences between Maryland's concededly 'even handed' and nondiscriminatory corporate licensure statute and the laws of other states are to be expected, and should not be mistaken for a 'burden' on interstate commerce." Maryland argues that the restrictions on funeral establishment ownership are rationally justified because the use of corporations "causes such business to be owned by people who do not know anything about" the business and because the restrictions foster a greater degree of accountability to regulators. It claims that the Maryland General Assembly had a rational basis for believing that "limiting funeral home licenses to *licensed individuals* would foster a greater degree of accountability to regulators than would the continued licensing of corporations, which are inherently designed to limit the personal responsibility of owners. That rational legislative judgment could reasonably be expected to yield putative benefits by allowing the [Morticians'] Board to better 'protect the health and welfare of the public.'" (Quoting Md. Health Occ. Code § 7-103).

The Commerce Clause states, "The Congress shall have Power . . . To regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, and it is well-established that this affirmative grant of authority implies a "negative" or "dormant" constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce. *See Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("It is also clear, however, that the Commerce

Clause does more than confer power on the Federal Government; it is also a substantive restriction on permissible state regulation of interstate commerce" (internal quotation marks and citation omitted)); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989) ("This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce"). As the Supreme Court recently observed, "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008) (internal quotation marks and citation omitted). The dormant Commerce Clause walks a narrow path leading courts to "rebuff[ ] attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). Thus, not all economic harms or anticompetitive choices are remedied through the application of the dormant Commerce Clause, but rather only those that *unjustifiably burden* inter-state commerce.

The analysis for determining whether a state law violates the dormant Commerce Clause proceeds on

two tiers. On the first tier, it inquires whether the state law *discriminates* against interstate commerce. Unless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a "discriminatory law is virtually *per se* invalid." *Davis,* 128 S. Ct. at 1808 (internal quotation marks and citation omitted); *see also Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.,* 401 F.3d 560, 567 (4th Cir. 2005). If there is no discrimination, a court will consider on the second tier whether the state laws "unjustifiably . . . burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon,* 511 U.S. 93, 98 (1994); *see also Yamaha,* 401 F.3d at 567. In addressing whether a state law unjustifiably burdens interstate commerce, the courts generally apply the so-called *Pike* test, under which the challenged law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

In this case, no contention is made that the Morticians Act discriminates against interstate commerce, and the district court concluded that there was no evidence of any discriminatory purpose. Rather, the issue presented is whether the corporate and individual licensure restrictions in the Morticians Act burden interstate commerce, and, if so, whether the burden is "clearly excessive" and not justified by putative local benefits. We begin that inquiry by

identifying the commerce implicated and how the Morticians Act purportedly burdens it.

The Morticians Act regulates the practice of mortuary science in Maryland, which includes the operation of funeral establishments, the preparation of dead bodies for disposition, and the arrangement for final disposition of dead bodies. *See* Md. Health Occ. Code §§ 7-301(a), 7-302, 7-101(p),(q). The practice of mortuary science is inherently a local profession, typically used by relatives to have the bodies of dead family members prepared for burial or other disposition and to provide a facility for visitation, mourning, and services. Indeed, other than providing out-of-state caskets, which are not in any way regulated by the Morticians Act, the service provided through the practice of mortuary science begins and ends within the State.

In licensing the profession and the establishments at which it is practiced, the Maryland Morticians Act does not purport to regulate activity outside of Maryland, and it focuses only on the services provided in Maryland at a funeral establishment in Maryland. Importantly, the regulation does not address, nor thereby affect, the flow of any goods or articles of commerce across state lines. The regulation concerns itself only with the provision of services from a physical establishment in the State. Thus, the Morticians Act purports to regulate an industry that is inherently local, not interstate, in nature.

Moreover, the Morticians Act does not treat persons from out-of-state any differently than persons in-state. Any person – out-of-state or in-state – may obtain a license to practice mortuary science and own and operate a funeral establishment in Maryland, and there is no limit on the number of licenses that the State may issue. Likewise, with respect to the 58 grandfathered corporations owning licenses, any person or corporation, out-of-state or in-state, may own the stock. Indeed, over one-half of the grandfathered corporations are owned by publicly-held out-of-state corporations.

In sum, any individual may practice mortuary science in Maryland, own a funeral establishment in Maryland, or own the stock of a grandfathered corporation holding a Maryland license to operate a funeral establishment. The only restrictions that are imposed by the Morticians Act relate to professional education, experience, and accountability. Thus, entry into the Maryland funeral services market is limited only by the choices of the individual as to how best to allocate his or her time and resources.

The dormant Commerce Clause is implicated by burdens placed *on the flow of interstate commerce* – the flow of goods, materials, and other articles of commerce across state lines. *See Oregon Waste Sys.*, 511 U.S. at 98 (stating that the dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976) (noting that it is "well

established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand"). And it is a trade barrier to the free flow of goods, materials, and other articles of commerce across state lines that violates the dormant Commerce Clause. The Clause does not purport to restrict or limit intrastate commerce, nor protect the participants in intrastate or interstate markets, nor the participants' chosen way of doing business. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) ("We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market" or "particular interstate firms").

Yet, it is precisely the particular structure or methods of operation in the Maryland retail market for funeral services about which the plaintiffs in this case complain, not about a burden on the flow of articles of commerce across state lines. Their complaints about the regulation center around either the inconveniences presented to them personally or the restrictions on how they would prefer to run their businesses when operating in Maryland.

They assert that corporate ownership of funeral establishments would facilitate financing, would protect them from personal liability, and would enable them to pass the business on to others, particularly family members. In addition, they state that

operating through a corporation would simply be a preferable way of doing business. Brown states, "I want to own and operate a funeral establishment on the grounds of Rest Haven Cemetery, but I do not want to become a licensed mortician." Jenkins states, "It is no coincidence that the largest funeral establishments in Maryland . . . are set up through the 58 special corporate licenses under the 'grandfather' clause. I simply want to be able to do what the law allows those businesses and businesspeople to do." Chisholm, who is a mortician licensed in Maryland but who lives in Florida, states, "[T]he challenges of running a Maryland business from Florida, particularly with respect to financing and liability, make corporate ownership essential if I am to expand Chisholm Funeral Services according to my plans." And Manuel states: "Neither my husband nor I want to devote the time and money to becoming licensed funeral directors or morticians. . . . Ideally, we want to own and operate our proposed funeral home as an ordinary business corporation . . . [but] [o]ur plans do not allow us to pay the exorbitant price, as much as $250,000, that one of these 'grandfather' corporations cost."

In short, the plaintiffs are challenging the way Maryland authorizes them to do business within the State in a profession regulated by the State. Their complaints do not involve burdens placed on the interstate movement of goods, materials, or other articles of commerce, and the matters of which they complain-the manner of professional practice in

Maryland-are not matters protected by the dormant Commerce Clause. As the Supreme Court stated in *Exxon,* "We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon,* 437 U.S. at 127-28.

In *Exxon,* a Maryland statute provided that producers or refiners of petroleum products, such as Exxon and Shell, could not operate retail service stations within Maryland. Exxon and other petroleum producers and refiners challenged the statute on constitutional grounds, including the dormant Commerce Clause, pointing to evidence that the statute's divesture requirements would cause at least three refiners to stop selling gasoline in Maryland, depriving consumers of competition and even certain special services. The Supreme Court rejected the argument, noting that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another," even if it will "change the market structure by weakening independent refiners." *Exxon,* 437 U.S. at 127. The Court explained:

> [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be

> injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

Id. at 127-28.

Likewise in the case before us, the Morticians Act "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Exxon*, 437 U.S. at 126. In fact, large funeral home conglomerates have a presence in the Maryland funeral services market, albeit not as large as they would like. But the fact that the burden of this permissible state regulation falls on corporations that may have interstate operations "does not, by itself, establish a [violation of the dormant Commerce Clause]." *Id.*

Further, just like the oil companies in *Exxon*, the plaintiffs complain that the Morticians Act hurts Maryland consumers and drives up the costs of funerals. The burden of this regulation, however, falls on *Maryland consumers*, not on *interstate commerce*, and a complaint about this burden "relates to the *wisdom* of the [Maryland] statute, not to its burden on [interstate] commerce." *Exxon*, 436 [sic] U.S. at 128 (emphasis added).

The plaintiffs rely heavily on our decision in *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005), to support their claim

that the Morticians Act violates the dormant Commerce Clause. They assert that *Yamaha,* which struck down a Virginia statute under the dormant Commerce Clause, is "directly on-point and provided the legal basis for the district court's commerce clause ruling" in this case.

In *Yamaha,* the Virginia statute at issue provided protection to existing motorcycle dealers in Virginia against the creation of new dealerships by motorcycle manufacturers and distributors such as Yamaha and Harley-Davidson, by giving the existing dealers the right to protest the creation of a new dealership through a process that "could take years to resolve," even if the protest were "frivolous." *Yamaha,* 401 F.3d at 571 (internal quotation marks and citation omitted). Moreover, a dealer could protest the appointment of a new dealer even if the new dealership were across the State, some 500 miles away and indisputably outside of the relevant market of the protesting dealer for selling motorcycles. *Id.* Yamaha, an out-of-state manufacturer and distributor of motorcycles, challenged the statute under the dormant Commerce Clause, arguing that the Virginia statute created an unjustifiable burden on interstate commerce by burdening Yamaha's ability to distribute motorcycles in Virginia. Agreeing with Yamaha's claim, we concluded that the Virginia statute did indeed "create[ ] a significant barrier to market entry . . . because of the virtual certainty of a protest whenever a manufacturer attempts to authorize a new dealership." *Id.* (internal quotation marks and

citations omitted). Because the delay in costs in the face of increasing demand in Virginia for motorcycles caused Yamaha and Harley-Davidson to forego establishing new dealers, we concluded that the Virginia statute imposed "heavy burdens predominantly on out-of-state interests" and thus "unduly burden[ed] commerce." *Id.* at 573.

Thus, *Yamaha* invalidated a statute that was aimed at the *interstate flow* of motorcycles into Virginia. Unlike in *Yamaha,* however, the Maryland Morticians Act is not aimed at any interstate flow of goods, materials, or articles of commerce. The Morticians Act is a local regulation of a localized profession where services are performed for clients entirely in Maryland. Rather than aiming at the interstate flow of commerce, the Morticians Act is aimed at making morticians and funeral directors in Maryland directly accountable to clients who come to them in Maryland to provide funeral services at their funeral establishments in Maryland. *Yamaha* does not advance the plaintiffs' argument that the Morticians Act imposes an unjustified burden on interstate commerce.

Because the Morticians Act does not place a barrier or burden on the flow of interstate commerce, it does not violate the dormant Commerce Clause. But even if it was considered to place an incidental burden on commerce, that incidental burden would not be excessive in light of the putative benefits from the Act's regulation.

While Maryland does not have extensive records explaining the purpose of the Act, the Supreme Court has recognized that promoting familiarity between an owner and his business in a licensed and regulated industry is a legitimate local interest. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973); *see also Goldfarb v. Supreme Court of Va.*, 766 F.2d 859, 862 (4th Cir. 1985) (recognizing that a state law exempting from examination lawyers licensed out of state who moved into Virginia to practice full time provides a putative local benefit because "the full-time practice requirement promotes familiarity with Virginia law among attorneys who have not passed the state bar examination"); *id.* (recognizing the "broad power [of States] to establish standards for licensing practitioners and regulating the practice of professions" (internal quotation marks and citation omitted)). More broadly, a State "has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987). The district court recognized that these very principles apply in this case to support "the notion that ownership of corporations may be limited in highly skilled occupations where licensing is required, such as mortuary science."

Maryland asserts that "limiting funeral home licenses to licensed individuals [will] foster a greater degree of accountability to regulators than would the continued licensing of corporations, which are

inherently designed to limit the personal responsibility of owners. That rational legislative judgment could reasonably be expected to yield putative benefits by allowing the [Morticians'] Board to better 'protect the health and welfare of the public.'" (Quoting Md. Health Occ. Code § 7-103). And the State's position is indeed advanced by the complaint in this case and the affidavits of the plaintiffs where they assert that they desire to use the corporate form because they "want to be insulated from personal liability for . . . negligence." This is precisely the kind of personal responsibility that the Morticians Act wishes to maintain. Indeed, the Maryland State Board of Morticians expressed this concern, claiming that unlicensed individuals and corporations would be less accountable. Thus, the Morticians Act provides individual liability and therefore more direct accountability for owners of funeral establishments while the plaintiffs desire less individual liability. This is the type of legislative decisionmaking into which courts should avoid inserting themselves. *See, e.g., Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. 2004) ("While the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the . . . electorate for its institution, not us").

In short, we conclude that the Morticians Act's incidental burden on interstate commerce is not excessive and is justified by the very real benefits of protecting the public health, safety, and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that business

and creating accountability to regulators and to clients. Accordingly, we reverse the district court's conclusion that the Act violates the dormant Commerce Clause.

III

In addressing plaintiffs' Due Process and Equal Protection Clause arguments, we agree with the district court's reasoning rejecting these arguments. Because the Morticians Act is an economic regulation, we may not strike it down unless it is "wholly arbitrary, without any basis in reason." *Guardian Plans Inc. v. Teague,* 870 F.2d 123, 126 (4th Cir. 1989) (internal quotation marks and citation omitted). In other words, to survive such challenges, the Act need only be "rationally related to a legitimate state interest." *Id.*

Our court has already recognized that a State has a "legitimate interest in protecting the health, safety and welfare of its citizens through regulation of the funeral profession." *Guardian Plans,* 870 F.2d at 126. A State's legislature may "rationally determine[ ] that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement. Our inquiry [under the Equal Protection and Due Process Clauses] ends here." *Id.*

Moreover, there is a rational basis to restrict corporate and unlicensed individual ownership of professional businesses. *See North Dakota Pharmacy*

Bd., 414 U.S. at 166-67. In *North Dakota Pharmacy Board*, the North Dakota legislature required that in order to obtain a permit to operate a pharmacy, the applicant had to be a registered pharmacist in good standing or a corporation or association, the majority of whose stock must be owned by registered pharmacists in good standing who are active in the day-to-day affairs of the corporation or association. In upholding those restrictions on corporate ownership, the Supreme Court explained that a rational relationship exists between restricting corporate ownership and the professions, quoting with approval Justice Holmes' dissenting opinion in *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928) (Holmes, J. dissenting):

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and [the State] after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be

> more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less."

North Dakota State Bd., 414 U.S. at 166-67. The same rationality exists for upholding the restrictions on corporate and unlicensed individual ownership in the Morticians Act.

The rationality of restricting corporate ownership in the Morticians Act is not undermined by exemptions contained in the Act, so long as the exemptions too are rationally based. *See Goldfarb*, 766 F.2d at 862-63 (finding rational an exemption from a state bar exam for out-of-state lawyers who moved to Virginia to practice full time even though bar applicants generally must take the bar exam before being licensed).

In the Morticians Act, corporations that historically held licenses in the funeral business were allowed to continue to hold licenses because the General Assembly wanted to protect reliance interests of family members. For a similar reason, spouses of deceased licensees are exempted from being licensed to allow the spouse, who presumably was already involved in the affairs of the business, to continue the business. The Act also provides an exemption for executors of licensees, allowing the

temporary operation of the funeral establishment to wind down the affairs of the business. The fact that the General Assembly created these rational exemptions does not undermine the overall rationality of the Morticians Act based on its relationship to a legitimate government purpose. *See Goldfarb,* 766 F.2d at 862-63.

The plaintiffs' position boils down to a disagreement with the General Assembly's judgment in refusing to authorize a different structure for practicing mortuary science in Maryland. This disagreement, however, is not a basis on which to render the Morticians Act unconstitutional.

> [A] law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the . . . requirement.
>
> * * *
>
> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of

> thought. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) (internal quotation marks and citations omitted).

IV

We conclude that the Morticians Act does not violate the dormant Commerce Clause, and accordingly we reverse the district court's judgment in that regard. We also conclude that the Act does not violate either the Equal Protection Clause or the Due Process Clause, and accordingly we affirm the district court in that regard.

The judgment of the district court is therefore

AFFIRMED IN PART AND REVERSED IN PART.

SHEDD, Circuit Judge, concurring:

I concur in the judgment reached by the majority. As to the dormant Commerce Clause issue, I concur to the extent that we find "that the Morticians Act's incidental burden on interstate commerce is not excessive and is justified by the very real benefits of protecting the public health, safety, and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that

business and creating accountability to regulators and to clients." *See Majority Op.* at 18.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action No.: RDB-06-524
DAVID HOVATTER, *et al.*,	*	
Defendants.	*	

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MEMORANDUM OPINION

(Filed Oct. 17, 2007)

Plaintiffs Charles Brown, Brian Chisolm, Joseph B. Jenkins, III, and Gail Manuel (collectively "Plaintiffs") bring this civil rights lawsuit pursuant to Article I, Section 8 and the Fourteenth Amendment of the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, seeking declaratory and injunctive relief against David Hovatter, in his official capacity as President of the Maryland State Board of Morticians, and Faye Peterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffery Pope, and Vernon Strayhorn, Sr., in their official capacities as members of the Maryland State Board of Morticians

(collectively "Defendants").[1] In this case, Plaintiffs challenge the constitutionality of two provisions of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602 (the "Act" or the "Morticians Act"), that limit ownership and operation of funeral homes in Maryland. This Court has granted the motion of the International Cemetery, Crematory and Funeral Association ("ICCFA") to file an *amicus curiae* brief in support of the Plaintiffs' complaint. Plaintiffs contend that the provisions prohibiting corporations from owning and operating funeral homes, as set forth in sections 7-309(a) and 7-309(b) of the Morticians Act, violate the Commerce Clause[2] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment[3] of the United States Constitution. In addition, Plaintiffs argue that section 7-310 of the Morticians Act violates the Due Process and Equal Protection Clauses because it permits funeral home ownership only by "licensed individuals," who are defined as licensed morticians, licensed funeral directors, or their surviving spouses and executors of their estates.

Pending before this Court are the parties' cross motions for summary judgment, which have been fully briefed by the parties. A hearing was held on

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[1] By order of December 8, 2006, this Court granted the motion of John Armiger to withdraw as a plaintiff in this action. (Paper No. 24.)

[2] U.S. Const. art. I, § 8, cl. 3.

[3] U.S. Const. amend. XIV, § 1.

September 10, 2007, at which time counsel for all the parties agreed that there are no genuine issues of material fact and that the case is ripe for determination by this Court as a matter of law. The respective motions for summary judgment by the parties are both GRANTED IN PART and DENIED IN PART.

For the reasons that follow, this Court holds that sections 7-309(a) and 7-309(b) of the Morticians Act, which prohibit corporate ownership of funeral homes in Maryland with indefinite exemptions for corporations holding licenses existing as of June 1, 1945, violate the dormant Commerce Clause of the United States Constitution. Defendants and their successors are hereby enjoined from prohibiting or limiting the corporate ownership of funeral homes in Maryland. For the reasons that follow, this Court holds that section 7-310 of the Morticians Act, which establishes a licensing scheme for the operation of funeral homes in Maryland, is rationally related to a legitimate state interest and does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The licensing requirement may be imposed upon corporate and non-corporate owners of funeral homes in Maryland. Accordingly, summary judgment will be GRANTED for Plaintiffs with respect to their challenge to sections 7-309(a) and 7-309(b) of the Morticians Act, and GRANTED for Defendants with respect to their defense of section 7-310 of the Morticians Act.

BACKGROUND

I. The Regulatory Scheme

The stated purpose of the Morticians Act "is to protect the health and welfare of the public." Md. Code Ann., Health Occ. § 7-103. The Morticians Act establishes a comprehensive scheme for the regulation of the funeral home industry and is enforced by the State Board of Morticians, of which Defendants are members. *Id.* §§ 7-201-205.

In 1971, the Morticians Act was amended to require that a funeral home must be licensed by the State Board of Morticians before commencing operations. Ch. 443, 1971 Md. Laws. In its current form, the Morticians Act provides as follows:

> A funeral establishment shall be licensed by the [State Board of Morticians] before the establishment may be used for the preparation of the remains, viewing, and conducting of services.[4]

Md. Code Ann., Health Occ. § 7-310(a)(1). The Morticians Act limits who may obtain a funeral home license by requiring that every application be signed by a "licensed individual" who is also "the owner or

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[4] The Morticians Act uses the term "funeral establishment" to mean "any building, structure, or premises from which the business of funeral directing or embalming is conducted." Md. Code Ann., Health Occ. § 7-101(h). The parties have referred to a "funeral establishment" by the more colloquial "funeral home," and this Court will likewise use the terms synonymously.

co-owner of the establishment to be licensed." *Id.* § 7-310(b)(2). There are four classes of "licensed individuals": (1) a licensed mortician, *id.* § 7-302; (2) a licensed funeral director, *id.* § 7-307;[5] (3) the surviving spouse of a deceased mortician or funeral director, *id.* § 7-308; or (4) the executor of the estate of a deceased mortician, *id.* § 7-308.1.

In order to become a licensed mortician, an applicant must obtain an associate of arts degree, complete a one- or two-year apprenticeship with a Maryland mortician, and pass both the national examination administered by the American Board of Funeral Service Education and a separate Maryland law and regulations examination. *Id.* § 7-303(b).[6] The surviving spouse license requires only that the applicant pass the Maryland law and regulations examination. *Id.* § 7-308(b). The executor license does not require passing any examination, but the license expires after six months. *Id.* § 7-308.1(f). Because the

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[5] There is very little statutory difference between a mortician and a funeral director. The Morticians Act defines a mortician as "an individual who practices mortuary science," *id.* § 7-101(o), and a funeral director as "an individual who is licensed by the Board to practice all aspects of mortuary science except for embalming." *Id.* § 7-101(g). The parties have used the term mortician to encompass both morticians and funeral directors, and this Court will use the terms synonymously to encompass both meanings.

[6] The State Board of Morticians no longer grants funeral director licenses. The funeral director licenses that currently exist were issued before May 2, 1973 and have been renewed biannually ever since. *Id.* § 7-307.

holder of a surviving spouse or executor license is not required to be qualified to practice mortuary science, the Morticians Act mandates that the holder of either license employ a supervising mortician at the funeral home. *Id.* §§ 7-308(e)(1); 7-308.1(e)(1).

The Morticians Act generally prohibits corporations from owning and operating funeral homes:

> Except as otherwise provided by law, a corporation may not operate a mortuary science business and the [State Board of Morticians] may not issue a license to or list any corporation as licensed to operate a mortuary science business.

Id. § 7-309(a); *see also id.* § 7-101(q)(i) (defining the phrase "[p]ractice mortuary science" as "[t]o operate a funeral establishment"). Corporations that held a license as of June 1, 1945, however, are exempt from the general prohibition on corporate ownership:

> The [State Board of Morticians] may renew only the license of a corporation that:
>
> (1) On June 1, 1945, held a license issued by this State;
>
> (2) Has been renewed continuously since that date;
>
> (3) Submits an application on a form required by the [State Board of Morticians]; and

(4) Pays a fee set by the [State Board of Morticians].[7]

Id. § 7-309(b). The general corporate prohibition and the exemption apply equally to licensed and unlicensed individuals. In other words, although one must be a "licensed individual" to own a funeral home in every other context, *see id.* § 7-310(b)(2), there is no corresponding provision requiring that the owner of an exempt corporate license be a "licensed individual." Nevertheless, the practice of mortuary science on the premises must at all times be conducted by a licensed mortician. *Id.* § 7-309(d). In sum, funeral home ownership in Maryland requires that an individual complete the demanding mortician licensing requirements, fall into one of the established status exceptions (*i.e.* surviving spouse or executor), or purchase an exempt corporate license.

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[7] This provision was enacted in two separate pieces of legislation. Before 1937, Maryland funeral homes could freely incorporate, but the Maryland General Assembly amended the Morticians Act that year to prohibit further corporate licensing. Ch. 306, 1937 Md. Laws. The amendment provided that "[t]he Board shall not hereafter issue licenses to, nor register any corporation, nor shall any corporation be permitted to conduct the business or profession of Funeral Directing which has not already been licensed and registered." In 1945, the Maryland General Assembly granted additional corporate licenses to "any person who was licensed as a funeral director and was engaged in the business of funeral directing or embalming at the time of induction into the Armed Forces of the United States during World War II." Ch. 741, 1945 Md. Laws.

In their submissions to the Court, the parties agree that there are currently 283 funeral home licenses in Maryland. (Def. Ex. 16; Sheffield-James Aff. ¶ 3-4.) Of those, licensed morticians or funeral directors hold 214, corporate licensees hold fifty-eight, and surviving spouses licensees hold eleven. (*Id.*) Publicly held corporations and national chains own thirty of the fifty-eight corporate licenses, while the remaining twenty-eight are owned by privately held Maryland corporations. (*Id.*) There is no sunset provision on the corporate exemption, so corporations that held licenses as of June 1, 1945 may retain their exemption indefinitely. Moreover, the corporation (along with its license) is freely transferrable regardless of whether the purchaser is a "licensed individual" under section 7-310(b)(2).

The Morticians Act's restriction on corporate ownership is unique. The only other state that has a similar prohibition on the corporate ownership of funeral homes is New Hampshire. The New Hampshire statute makes clear that "no corporation . . . shall be issued a license as a funeral director," except for "any corporation licensed prior to January 1, 1953." N.H. Rev. Stat. Ann. § 325:15. Pennsylvania's statute provides that all of the corporation's "shareholders [must be] licensed funeral directors or the members of the immediate family of a licensed funeral director." 63 Pa. Stat. Ann. § 479.8. Therefore, unlike both Maryland and New Hampshire, the Pennsylvania statute regulates only who owns the corporation, but not how many corporations can

operate funeral homes. No other state restricts corporate ownership quite like Maryland and New Hampshire.

II. Efforts to Amend the Morticians Act

The Morticians Act ownership provisions have survived previous judicial and legislative challenges. In 1960, a licensed mortician named L. Scott Brooks formed a corporation and applied for a corporate license to the State Board of Funeral Directors and Embalmers, the former name of the State Board of Morticians. Citing the statutory prohibition on corporate ownership, the Board denied his request, but Brooks nonetheless began operating his corporate funeral home. The Board subsequently suspended his mortician's license for one year. Brooks appealed the suspension to the Court of Appeals of Maryland in the case of *Brooks v. State Board of Funeral Directors and Embalmers,* 195 A.2d 728 (Md. 98) (1963). The Court of Appeals upheld the corporate prohibition, writing that:

> It may at first blush seem strange that the legislature permits some corporations to conduct the business of a funeral director, but refuses to permit others to do so. One of the two kinds of corporations . . . is established under a grandfather clause; the other was designed to preserve the assets and going concern value of the business of men engaged in the service of the country during war. The exceptions in favor of each of these

> types of corporations had the purpose of preserving existing investments or values. We are of the opinion that this purpose is sufficient to sustain their separate classification.

Id. at 737. Accordingly, the Court of Appeals held that the corporate prohibition did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 739. This 1963 decision by Court of Appeals did not address the corporate prohibition and its validity in light of the dormant Commerce Clause of the United States Constitution.

In 1996, the Maryland General Assembly created the Task Force to Examine the State's Cemetery and Funeral Industry to assess the regulation of the funeral industry in Maryland and other states. The Task Force concluded, *inter alia*, that "Maryland law [should] be changed to allow the issuance of additional corporate licenses for the ownership and operation of funeral homes." Final Report of the Task Force to Examine the State's Cemetery and Funeral Industry, at 22-23 (Dec. 1996). The Final Report set off a flurry of legislative reform proposals. Bills proposing the deregulation of entry barriers into the Maryland funeral market industry were proposed in every year from 1997 through 2005, but none of these measures ever made it out of committee for a full vote

of the Maryland House of Delegates or the Maryland State Senate.[8]

The State Board of Morticians and the Maryland State Funeral Directors Association ("MSFDA") have consistently opposed legislative reform. The State Board of Morticians is comprised of eight licensed morticians and four consumer members. Md. Code Ann., Health Occ. § 7-202(a). At least two members of the current State Board of Morticians have a direct interest in maintaining the prohibition on corporate ownership.[9] Moreover, there is significant overlap between the State Board of Morticians and the MSFDA. In fact, seven of the eight licensed morticians sitting on the State Board of Morticians are members of the Maryland State Funeral Directors Association. Thus, Plaintiffs contend that "the obvious financial interest these members had in maintaining the general prohibition on corporate ownership presents a troubling gloss on the Board's

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[8] In fact, thirteen separate bills were introduced. *See* Sen. 340, 420th Sess. (Md. 2005); H.B. 795, 418th Sess. (Md. 2004); H.B. 1341, 418th Sess. (Md. 2004); H.B. 956, 417th Sess. (Md. 2003); H.B. 1113, 417th Sess. (Md. 2002); H.B. 1036, 415th Sess. (Md. 2001); H.B. 1464, 415th Sess. (Md. 2001); H.B. 188, 414th Sess. (Md. 2000); H.B. 503, 414th Sess. (Md. 2000); H.B. 107, 413th Sess. (Md. 1999); H.B. 475, 413th Sess. (Md. 1999); H.B. 591, 412th Sess. (Md. 1998); H.B. 321, 412th Sess. (Md. 1997).

[9] Defendant Kruger works for a corporate-owned funeral home, and Defendant Ruck owns three corporate licenses himself. (Pl. Ex. 21, Ruck Dep. 10:9-10:10.)

consistent opposition to the legislative reform measures." Pls.' Mem. Supp. Summ. J. at 15.

Plaintiffs present this evidence as a prototypical example of "regulatory capture," a term coined by public choice economists to indicate when members of a regulated occupation also dominate the regulatory and law-making process in their field. Professor Todd Zywicki of George Mason University School of Law, a leading scholar in law and economics, testified that the limitations on funeral home ownership in Maryland are consistent with the principles of regulatory capture. He stated that in his opinion the Morticians Act appears to be:

> an effort to create governmentally imposed barriers to entry in the funeral home industry and thereby to transfer wealth to a discrete, well-organized interest group at the expense of consumers of funeral home services and the public at large. The result of this regulation is reduced competition in the provision of funeral home services and higher prices and reduced choice in funeral home products and services for consumers.

(Pl. Ex. 7, Zywicki Decl. ¶ 9.)

III. The Practical Effect of the Morticians Act

At the hearing on September 10, 2007, counsel for the Defendants did not dispute Plaintiffs' credible evidence indicating that the fifty-eight corporate licenses are quite valuable, in large part because of

the market premium that results from their insulated and protected status. For example, the Department of Legislative Services of the Maryland General Assembly has consistently valued each of the corporate licenses, excluding assets, at between $150,000 to $200,000. *See, e.g.* Fiscal Notes for H.B. 1113, 417th Sess. (Md. 2002) (concluding that "[b]ecause entry into the corporate market is restricted and there is greater demand for corporate licenses than there are licenses, corporate licenses are currently traded at a value between $150,000 to $200,000"); *see also* Fiscal Notes for H.B. 188, 414th Sess. (Md. 2000); H.B. 503, 414th Sess. (Md. 2000); Fiscal Notes for H.B. 107, 413th Sess. (Md. 1999); Fiscal Notes for H.B. 591, 412th Sess. (Md. 1998); Fiscal Notes for H.B. 321, 412th Sess. (Md. 1997). Plaintiffs have also submitted the testimony of Defendant Ruck, who paid $148,000 for a licensed corporation, excluding all assets except name, and $30,500 for a second licensed corporation with no assets whatsoever. (Pl. Ex. 21, Ruck Dep. 56.15-57.11.) Erich March, a prominent Maryland mortician, testified that he was personally aware that a corporate license sold for $250,000 more than a decade ago and Defendant Jones acknowledged that one may sell for upwards of $300,000.[10] (Pl. Ex. 28, March Dep. 36:13-14; Ex. 17, Jones Dep. 62:19-20.)

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[10] The remainder of Plaintiffs' evidence supporting this argument is too speculative to influence a motion for summary judgment, including the testimony of Earl Canapp, the legislative chair of the MSFDA. *See Williams v. Griffin*, 952 F.2d 820,

(Continued on following page)

Data collected by the United States Census Bureau indicates that a funeral in Maryland costs approximately $800 more than the national average, a price increase that partly reflects the anti-competitive nature of the Maryland funeral home industry. (Pl. Ex. 6, Harrington Decl. ¶¶ 20-30.) In response to a request by Delegate Joanne C. Bensen, who at the time was anticipating a vote on proposed House Bill 795, the staffs of the Federal Trade Commission's Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics and the Office of Policy Planning drafted a letter that concluded that "consumers would likely benefit from having increased competition in the market for funeral home services" and that reforming the statute would not "undermine Maryland's efforts to ensure that consumers are served by capable and professionally run funeral homes." (Pl. Ex. 3, FTC Letter to Delegate Benson, at 3.)

The benefits of the corporate form are well known and uncontested, and apply in equal force to the Maryland funeral home industry. These benefits include free transferability, limited liability, tax advantages, perpetual existence, and the superior ability to raise capital through stock sales. Given the advantages of incorporation, it is unremarkable that,

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823 (4th Cir. 1991) (stating that testimony in opposition to a summary judgment motion must set forth specific facts based on personal knowledge).

at an absolute minimum,[11] fifty-one percent of funeral homes nationwide are registered in the corporate form. (Harrington Decl. ¶ 16.) Despite these advantages, however, only twenty-one percent of funeral homes in Maryland are owned by corporations. (*Id.*)

IV. Procedural History

Plaintiff Brown and Plaintiff Manuel are prevented from owning a funeral home because they are not "licensed individuals," and challenge the licensing requirements of section 7-310 of the Morticians Act under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiff Chisholm and Plaintiff Jenkins, although licensed morticians, are unable to open a funeral home in the corporate form because they do not own one of the fifty-eight exempt corporate licenses. As such, they challenge section 7-309(a) of the Morticians Act under the Due

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[11] Professor David Harrington, an economist who specializes in the funeral industry, explained that the United States Census Bureau conducts an extensive survey of the funeral industry every five years. (Harrington Decl. ¶ 16 n. 1.) The results are split into two groups: firms with paid employees and firms without paid employees. (*Id.*) Only the ownership status of firms with paid employees is released. (*Id.*) In 2002, over eighty-seven percent of firms nationwide with paid employees were corporations. (*Id.*) Based on the assumption that *none* of the firms without paid employees was a corporation, Professor Harrington determined *at least* fifty-one percent of funeral homes nationwide were incorporated. (*Id.*) Fifty-one percent is therefore not a prediction but instead represents the lowest possible percentage of incorporated funeral homes.

Process and Equal Protection Clauses of the Fourteenth Amendment in light of the exempt corporations under section 7-309(b). Plaintiff Chisholm, a Florida resident, is the only Plaintiff with residency outside of Maryland. He challenges section 7-309(a) under the dormant Commerce Clause. On March 1, 2006, Plaintiffs filed suit against the members of the State Board of Morticians in their official capacities.

On October 11, 2006, this Court granted Defendants' Motion to Dismiss Count Four of the Complaint, which alleged that the Morticians Act violated the Privileges and Immunities Clause of the Fourteenth Amendment by imposing arbitrary and unreasonable restrictions on the ownership of funeral homes. (Paper No. 19.) This Court denied the remainder of Defendants' Motion to Dismiss, thereby allowing Plaintiffs to proceed with discovery with respect to the remainder of their claims. Specifically, Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 that section 7-310 of the Morticians Act violates the Due Process and Equal Protection Clauses because it permits funeral home ownership only by "licensed individuals." Plaintiffs also seek a declaratory judgment that the corporate prohibition of section 7-309(a) of the Morticians Act violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the dormant Commerce Clause. On April 24, 2007, the parties filed cross motions for summary judgment. On September 10, 2007, the Court conducted a hearing on both motions.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). When cross motions for summary judgment demonstrate a basic agreement concerning what legal theories and material facts are dispositive, they "may be probative of the nonexistence of a factual dispute." *Shook v. United States,* 713 F.2d 662, 665 (11th Cir. 1983). At the hearing conducted on September 10, 2007, the parties agreed that there is no dispute as to any material fact and that this Court may render judgment as a matter of law.

DISCUSSION

I. Section 7-310: The Licensing Requirement

Plaintiffs have advanced their challenge on the licensing requirement to the Morticians Act under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The substantive aspect of the Due Process Clause embodies a liberty interest that protects, subject to reasonable government regulation, the right to pursue a chosen occupation. *E.g. Conn. v. Gabbert,* 526 U.S. 286, 291-92 (1999);

Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). The Equal Protection Clause likewise provides for protection against government regulations that do not treat similarly situated individuals alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

In addressing due process and equal protection challenges to state statutes, the United States Court of Appeals for the Fourth Circuit has explained that there is "a strong presumption of validity so long as [the state statute does] not discriminate against any protected class or burden any fundamental right." *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993)). As the Fourth Circuit noted, the Supreme Court in *Vacco v. Quill*, 521 U.S. 793, 799 (1997), held that a state statute need only bear a "rational relation to some legitimate end." Both parties agree that the issues raised by Plaintiffs with respect to the licensing requirement set forth in section 7-310 do not implicate any fundamental right or suspect classification.

In addressing a constitutional challenge to the Oklahoma Funeral Services Licensing Act by casket sellers seeking to sell caskets in Oklahoma, the United States Court of Appeals for the Tenth Circuit in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004),

summarized the standard for analysis.[12] The court stated that a "state economic regulation that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification" will pass "constitutional muster, both as a matter of substantive due process and equal protection, by applying rational-basis review." *Id.* at 1215 (citing *Fitzgerald v. Racing Assoc. of Cent. Iowa*, 539 U.S. 103, 107 (2003) (equal protection); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (substantive due process)). Accordingly, the constitutional challenge to the licensing requirement of the Morticians Act is subject only to rational basis review. Although the interests protected by the Due Process and Equal Protection Clauses are distinct-substantive due process protects fundamental rights and liberty interests from arbitrary government action, while equal protection provides for equal treatment between individuals or groups of individuals – they are analyzed together. *See Guardian Plans Inc. v. Teague*,

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[12] In *Powers*, the Tenth Circuit affirmed a district court judgment following a bench trial that found that the state statute in question did not violate substantive due process or equal protection. The Tenth Circuit noted the contrary opinion of the United States Court of Appeals for the Sixth Circuit in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), in which the court affirmed a district court judgment following a bench trial that found that the licensing requirements for retail funeral merchandise stores were not rationally related to the purpose of the statute and thus violated substantive due process and equal protection. The rational basis test was recognized as the standard for analysis in both cases.

870 F.2d 123, 125 n.2 (4th Cir. 1989) ("For analytical purposes, we will treat appellants' due process and equal protection challenges as one. We do this because, when reviewing economic regulations, the legal standard – rationally related to a legitimate state interest – is the same." (internal citation omitted)).

Rational basis review is the most deferential and least exacting standard to review constitutional claims:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1979). The Morticians Act expressly states that its purpose "is to protect the health and welfare of the public." Md. Code Ann., Health Occ. § 7-103. Although there is no legislative history to elaborate on this stated purpose, there is no doubt that the protection of the health and safety of the citizens of Maryland is a legitimate purpose. *E.g. Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 375-76 (1997); *Hodel v. Virginia Surface Mining & Reclamation*

Ass'n, 452 U.S. 264, 300 (1981). Under rational basis review, this Court may not inquire into the sincerity of the articulated purpose because it must be "assume[d] that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (internal quotations omitted).

Moreover, this Court must consider whether the licensing requirement of the Morticians Act, as set forth in section 7-310, furthers any legitimate purpose, even if the legitimate purpose is unrelated to the actual purpose behind the statute. As an economic regulation, the Morticians Act must be upheld "if there [are] any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 508 U.S. at 313. The burden under rational basis review falls squarely on Plaintiffs "to negative every conceivable basis which might support it. Moreover, . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315 (internal citations omitted).

Plaintiffs contend that the licensing requirement of the Morticians Act does not meet this minimal standard because there is no justification for prohibiting non-morticians from owning funeral homes. Plaintiffs' argument is couched almost exclusively in

terms of the surviving spouse and executor licenses, which, according to Plaintiffs, demonstrate the arbitrariness of the licensing requirement. The Morticians Act, however, requires that funeral homes owned by a surviving spouse or executer licensee employ a supervising mortician on the premises. *See* Md. Code Ann., Health Occ. §§ 7-308(e)(1); 7-308.1(e)(1).

In a factually similar case, *Guardian Plans, Inc. v. Teague,* 870 F.2d 123, 125-26 (4th Cir. 1989), the Fourth Circuit upheld a Virginia statute that was challenged on due process and equal protection grounds by a company that sold funeral goods and services through an insurance-funded prearranged funeral program. The basis for the lawsuit was that the plaintiffs believed that it was "ludicrous to require a salesperson, who does nothing more than make preneed arrangements, to have the same credentials as a full-fledged funeral director." *Id.* at 126. Noting that it has long been recognized that the state may protect the health, safety and welfare of its citizens through the regulation of the funeral profession, the Fourth Circuit found that the "Virginia General Assembly could have rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement." *Id.*

In this case, the Maryland General Assembly could have rationally determined that the public's health, safety and welfare are furthered by requiring

that a licensed mortician own the funeral home where mortuary science is practiced. The exceptions to the licensing requirement of the Morticians Act are an insufficient basis for this Court to strike down wholesale the regulatory scheme established by section 7-310. The surviving spouse and executor licenses provide needed protection for the financial interests of a deceased mortician's family as business affairs are handled in her or his absence. The executor license may not be "renewed or reinstated" after six months, at which point the personal representative must "qualify and be licensed as a mortician." These licenses do not come at the expense of public health, safety, or welfare, as the surviving spouse or executor is required to hire a supervising mortician. *See* Md. Code Ann., Health Occ. §§ 7-308(e)(1); 7-308.1(e)(1).

Protecting the health, safety and welfare of the public is undoubtedly a legitimate state interest, and this Court finds that the licensing scheme of section 7-310 of the Morticians Act rationally furthers that interest. The wisdom of the Maryland General Assembly with respect to the licensing requirement and limited exceptions for a surviving spouse and executor will not be questioned by this Court under a substantive due process or equal protection challenge as the licensing scheme is rationally related to the achievement of a legitimate state interest and objective. *See McGowan*, 366 U.S. at 425.

II. Sections 7-309(a) and 7-309(b): The Corporate Prohibition

Plaintiffs have challenged the general corporate prohibition of section 7-309(a), as well as the exemptions created by section 7-309(b), under not only the Due Process and Equal Protection Clauses of the Fourteenth Amendment, but also the dormant Commerce Clause. In 1963, the Court of Appeals of Maryland addressed due process and equal protection challenges to the ban on corporate ownership of funeral homes in *Brooks v. State Board of Funeral Directors and Embalmers,* 195 A.2d 728 (1963). In *Brooks*, the Morticians Act was not challenged under the dormant Commerce Clause. Plaintiffs' constitutional challenges in this action invite further rational basis review under the Due Process and Equal Protection Clauses, but Maryland's unique ban on corporate ownership of funeral homes, with fifty-eight exempt corporate licenses, compels this Court to decide the case under the dormant Commerce Clause.

A. Due Process and Equal Protection Clauses of the Fourteenth Amendment

Because neither the corporate prohibition of section 7-309(a) nor the fifty-eight corporate exemptions under section 7-309(b) implicate a fundamental right or suspect classification, Plaintiffs' challenge is subject to the same rational basis review discussed at length above. In *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973), the Supreme Court upheld a state statute that

required that licensed pharmacists own the majority of shares in a corporation seeking to be licensed to practice pharmacy. The Supreme Court explained as follows:

> 'A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. . . . The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. . . . The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.'

Id. (quoting *Liggett Co. v. Baldridge,* 278 U.S. 105, 114-15 (1928) (Holmes, J., dissenting)). The quoted passage supports the notion that ownership of corporations may be limited in highly skilled occupations where licensing is required, such as mortuary science. The Maryland General Assembly certainly has a rational basis to require the presence of licensed individuals in the ownership structure of a corporation practicing mortuary science. For example, Pennsylvania has enacted a statute very similar to the statute approved by the Supreme Court in *Snyder's Drug Stores, Inc.,* whereby all the shareholders of a corporate funeral home must be "licensed funeral directors or the members of the immediate family of a licensed funeral director." 63 Pa. Stat.

Ann. § 479.8. The Morticians Act, however, only permits fifty-eight exempt corporations to practice mortuary science, any of which may be owned entirely by unlicensed individuals.

Nonetheless, Defendants contend that the fifty-eight exempt corporations under section 7-309(b) "preserve the reliance interests of corporations that held licenses as of June 1, 1945." Defs.' Mem. Supp. Summ. J. at 23. They rely principally on *Brooks*, where the Court of Appeals of Maryland held that the original owners' reliance interests were sufficient to sustain the corporate prohibition because the classification had the "purpose of preserving existing investments or values." *Brooks*, 195 A.2d at 737. While there may have been a rational basis in preserving economic investments in 1963, it is now questionable whether the legitimate state interest in preserving economic investments of original owners is rationally furthered by the current statutory scheme.[13]

As this Court discussed in its memorandum opinion on Defendants' Motion to Dismiss (Paper No. 19), the exempt corporate licenses under section

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[13] In 1963, seventy-six percent of the corporate licenses remained in the control of the pre-1945 owners. By 2006, over ninety-five percent of the corporate licenses had been sold at least once. There are only three corporate licenses still held within the same family as in 1945. Pls.' Mem. Supp. Summ. J. at 8. Thus, there appears to be a diminished rational basis for sustaining the existing statutory structure based on the reliance interests of corporations that held licenses as of June 1, 1945, when the current exemptions were enacted.

7-309(b) are permanent. Permanent exemptions raise serious equal protection concerns by creating an indefinite classification system that benefits some to the exclusion of all others. *See Delaware River Basin Com'n v. Bucks County, Etc.*, 641 F.2d 1087, 1098-99 (3d Cir. 1981). This Court has difficulty finding how a defined class of permanent corporate exemptions in a skilled occupation, such as mortuary science, rationally furthers the public's health and safety. The licenses are also freely transferable as long as the holder continues to renew it. In this regard, section 7-309(b) of the Morticians Act is distinguishable from the provisions at issue in *City of New Orleans v. Dukes,* 427 U.S. 297, 303-04 (1976), where the Supreme Court upheld a New Orleans ordinance that generally prohibited pushcart vendors from operating in the French Quarter, but which exempted pushcart vendors who had operated in the Quarter for at least eight years in a grandfather provision. The exempt pushcart licenses were personal to the existing vendors and consequently limited in duration. Section 7-309(b) of the Morticians Act is likewise distinguishable from the provisions at issue in *Helton v. Hunt,* 330 F.3d 242, 246-47 (4th Cir. 2003), where the Fourth Circuit held that North Carolina could constitutionally ban the operation of video poker machines brought into the state after June 30, 2000, but not video poker machines brought into the state before that date. As in *Dukes,* the exemption in *Helton* was not permanent because it applied to individual poker machines, which presumably break down over time.

This Court recognizes the full faith and credit extended to decisions of the Court of Appeals of Maryland. As set forth in 28 U.S.C. § 1738, the statutory analogue to the Full Faith and Credit Clause in the United States Constitution,[14] "[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State." Mindful of this deference to the Court of Appeals' 1963 decision in *Brooks,* this Court need not invalidate sections 7-309(a) and 7-309(b) on the questionable grounds that they still rationally further a legitimate interest under the Due Process and Equal Protection Clauses. The Maryland ban on corporate ownership on funeral homes, along with the fifty-eight exempt corporate licenses, cannot survive dormant Commerce Clause analysis.

B. Dormant Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . [to] regulate Commerce . . . among the several states."[15] In addition to this express authorization to Congress, the Commerce Clause has also been interpreted for over 150 years as implicitly embodying a self-excluding limitation on the power of the states to substantially burden

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[14] U.S. Const. art. IV, § 1.

[15] U.S. Const. art. I, § 8, cl. 3.

interstate commerce, a restriction known as the "dormant Commerce Clause." *See Cooley v. Bd. of Wardens,* 53 U.S. (12 How.) 299, 317-20 (1852). The dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Dennis v. Higgins,* 498 U.S. 439, 446 (1991). The Framers of our Constitution not only intended that "every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," but also that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 539 (1949). Thus, the primary objective of the dormant Commerce Clause is to "preserve a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy,* 519 U.S. 278, 299 (1997). The Supreme Court has cautioned, however, that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Lewis v. BT Inv. Mgrs. Inc.,* 447 U.S. 27, 36 (1980) (internal quotations omitted).

In *Yamaha Motor Corp. v. Jim's Motorcycle Inc.,* 401 F.3d 560, 567 (4th Cir. 2005), the Fourth Circuit explained that "[a]nalysis of a dormant Commerce Clause challenge to a state statute proceeds on two tiers, a discrimination tier and an undue burden tier."

A state law that discriminates against interstate commerce facially, in its practical effect or in its purpose is properly reviewed under the first analytical tier. *Wyoming v. Oklahoma,* 502 U.S. 437, 454-55 (1992); *see also Envtl. Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir. 1996). A discriminatory state law is subject to a *per se* rule of invalidity and will be struck down unless the state establishes "both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (internal quotations omitted). Mere economic protectionism alone is never sufficient to sustain a challenged state law under the dormant Commerce Clause. *Wyoming,* 502 U.S. at 454-55. The second analytical tier, known as the *Pike* balancing tier, applies to a state law if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). Under the *Pike* balancing tier, the state law will withstand constitutional scrutiny unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Id.*

Plaintiffs' dormant Commerce Clause challenge relates only to sections 7-309(a) and 7-309(b), the provisions that prevent further corporate ownership of funeral homes beyond the fifty-eight available corporate licenses in existence since 1945. Plaintiffs correctly concede that these provisions do not facially discriminate against interstate commerce. Instead,

Plaintiffs assert that the two sections of the Morticians Act discriminate in practical effect against interstate commerce and therefore should be struck down under the first tier.[16] Alternatively, they argue that even if the two sections of the Morticians Act do not discriminate against interstate commerce in practical effect, they nonetheless fail the *Pike* balancing test. These arguments will be addressed in turn.

1. Discriminatory Effect of the Morticians Act

A state law is deemed to have a discriminatory effect if it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*

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[16] Plaintiffs mention that the Morticians Act is "arguably discriminatory in purpose." Pls.' Mem. Supp. Summ. J. at 16. In determining whether a given piece of legislation has a discriminatory purpose, "[t]here is, of course, no more persuasive evidence . . . than the words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). As discussed earlier, the stated purpose of the Morticians Act is to "protect the health and welfare of the public." Md. Code Ann., Health Occ. § 7-103. Both parties readily acknowledge that there is a dearth of direct legislative history and therefore an absence of any readily discernible source that contradicts the Maryland General Assembly's self-serving statement of legislative intent. *Cf. Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1259 n.10 (4th Cir. 1995). In short, there is simply no evidence of discriminatory purpose.

Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994). Plaintiffs contend that the Morticians Act "plainly discriminates in practical effect" against interstate commerce because it "permits [fifty-eight] favored domestic corporations to own funeral homes, but *categorically forbids* out-of-state corporations from doing so." Pls.' Mem. Supp. Summ. J. at 26 (emphasis added). In 1945, the Maryland General Assembly effectively prevented all additional corporations from entering the market except for the Maryland corporations already in existence. As accurate as Plaintiffs' assertion may have been in 1945 when the provision at issue was enacted, it is plainly no longer the case according to Plaintiffs' own submissions: "At present, licensed morticians own about half of the [fifty-eight] 'grandfather' corporations, while the national chains . . . own the other half."[17] Pls.' Mem. Supp. Summ. J. at 6-7.

There is no question that the Morticians Act, and especially the provision restricting corporate ownership, is at minimum a protectionist piece of legislation. The Morticians Act does not, however, "negatively impact interstate commerce to a greater degree than intrastate commerce." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001). Plaintiffs' comparison to *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), is therefore misguided.

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[17] Counsel for the parties acknowledged at the hearing on September 10, 2007 that the national chains were required to purchase existing corporate licenses.

In *West Lynn*, the Supreme Court struck down a Massachusetts pricing order that taxed all milk sold in the state and distributed the tax revenue exclusively to in-state milk producers. *Id.* at 194-96. Although facially nondiscriminatory, the effect of the pricing order was clearly discriminatory because the exclusive tax revenue distribution to in-state producers placed the tax burden solely on out-of-state producers. The practical effect of section 7-309(a) of the Morticians Act, however, is to prevent all corporations without an exempt corporate license from owning a funeral home, regardless of whether the corporation is a Maryland one or not. The Morticians Act regulates evenhandedly by treating in-state and out-of-state interests the same.

Plaintiffs nevertheless rely on *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), to support their argument. In *Carbone*, the Supreme Court invalidated under the dormant Commerce Clause a local flow control ordinance that required all waste entering the town be delivered to a particular processing facility. *Id.* at 394-95. The ordinance in *Carbone* was found to be discriminatory even though it covered in-state processors. *Id.* at 389. The Supreme Court, however, made it clear that "[i]n this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid." *Id.* The import of *Carbone* should not be extended beyond the line of cases in which the Supreme Court deliberately placed it.

2. Undue Burden of the Morticians Act

The framework to review the corporate prohibition of the Maryland Morticians Act was delineated in *Pike v. Bruce Church,* 397 U.S. at 142. Under the *Pike* test, a statute that regulates evenhandedly may nonetheless violate the dormant Commerce Clause if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142, 90 S.Ct. 844. The *Pike* test represents a "less strict scrutiny," *Wyoming,* 502 U.S. at 455 n. 12, whereby "the extent of the burden that will be tolerated . . . depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike,* 397 U.S. at 142. Under the *Pike* test, this Court is required to analyze the putative benefits of the Morticians Act to determine whether the Maryland General Assembly had a "rational basis for believing there was a legitimate purpose that would be advanced by the statute." *Yamaha,* 401 F.3d at 569. This Court is reminded by Defendants that "[i]n determining whether a statute has 'a legitimate local purpose' and 'putative local benefits,' a court must proceed with deference to the state legislature." *Id.* While deference to the state legislature is unquestionably required, the Fourth Circuit has been more exacting than Defendants have suggested in their submissions.

For example, the Virginia statute at issue in *Yamaha,* like the Maryland Morticians Act, intended

to limit new competition. The statute permitted any existing motorcycle dealer in Virginia to protest the establishment of a new dealership selling the same brand anywhere within the state. *Id.* at 563. Defendants argued that it prevented "market saturation," but the Fourth Circuit reviewed the evidence presented by the parties and found that it was a "serious question" whether the "weak" benefit adduced by the state was legitimate. *Id.* at 571. The court ultimately concluded that there was an "absence of evidence that protection in the form of statewide protest rights for every motorcycle dealer was needed." *Id.* at 573.

Similarly, in *Medigen, Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993), the Fourth Circuit affirmatively questioned and ultimately rejected the state's purported benefit, which was "reasonable prices," by examining the record before it. The court explained that "where competition has destructive effects, regulation may be justified. . . . We find *no basis in the record*, however, for concluding that competition in this market has had or will have any destructive effects. Because the 'ruinous' effects of competition are entirely speculative, their prevention cannot justify restricting market entry." *Id.* (emphasis added).

In this case, Defendants argue that the legitimate purpose furthered by the corporate prohibition is consumer protection. *See* Defs.' Mem. Supp. Summ. J. at 32 ("The Maryland General Assembly made the rational determination that the citizens of Maryland would be afforded greater protection if corporations

were no longer issued licenses."); Defs.' Resp. at 15 ("The Maryland Morticians Act is an exercise of the state's police power in an effort to regulate morticians and protect the citizens of Maryland."). Defendants offer the deposition of Defendant Hovatter, the President of the State Board of Morticians, who testified that corporations are not accountable or responsive. Plaintiffs have countered with evidence that Defendant Hovatter never actually studied the matter, nor did anybody else on the State Board of Morticians. Pls.' Mem. Supp. Summ. J. at 10-11. Plaintiffs also point to the preceding President, Greg Harthausen, who testified that corporate-owned funeral homes were often more responsive than individually-owned funeral homes to concerns and requests from the State Board. (Pl. Ex. 9, Harthausen Decl. ¶ 4.) The selective statements by other members of the State Board of Morticians are also unsupported by any objective criteria. In fact, Harthausen testified that during his tenure the State Board of Morticians did not have "any evidence that non-mortician ownership of funeral homes would hurt consumers in any way." (Harthausen Decl. ¶ 4.) Moreover, despite Defendants' claims that funeral homes owned by corporations pose discrete consumer protection concerns, they never acted on these concerns by subjecting the fifty-eight licensed corporations to any additional oversight, nor have they required corporations to disclose their status to potential customers. *Id.* Considering the undisputed facts in this case, this Court must conclude that the Defendants' claims of consumer protection concerns appear to be no more

than "entirely speculative." *Medigen*, 985 F.2d at 167. Instead, Maryland consumers have been negatively affected by the lack of competition resulting from the corporate prohibition. This negative impact is reflected by the inflated cost of funerals in Maryland which well exceed the national average.

Turning to the burden side of the *Pike* ledger, "a closer examination" is required. *Yamaha*, 401 F.3d at 569. In Maryland, publicly held corporations and national chains own thirty of the fifty-eight corporate licenses, but twenty-eight are owned by privately held Maryland corporations. Defs.' Mem. Supp. Summ. J. at 12. Despite these balanced figures, the burden on interstate commerce is still significant in that any person wishing to own a corporate funeral home in Maryland must wait until one of the fifty-eight corporate licenses is for sale. Once one is placed on the market, the price for the license is inflated. The market premium placed on a corporate license is not only demonstrated through testimonial evidence, but also through data submitted by the Department of Legislative Services of the Maryland General Assembly.

The *Yamaha* Court found that there was a "chilling effect" on the ability of motorcycle dealerships to expand into Virginia. *Yamaha*, 401 F.3d at 571. Plaintiffs have also established that there is a "chilling effect" on corporate expansion of funeral homes into Maryland, as evidenced by data demonstrating that the percentage of corporate funeral homes in Maryland is at least thirty percent

lower than the national average. In *Yamaha,* the motorcycle dealers were forced to "forego [all efforts to] establish new dealers in Virginia," instead "devot[ing] their capital and business expansion efforts in other states." *Yamaha,* 401 F.3d at 572. Similarly, Plaintiff Chisholm has been prevented from opening a corporate funeral home in the local market because of the prohibition. It is quite clear to this Court that the undisputed facts in this case compel the conclusion that the Morticians Act has had a "chilling effect" on the ability of out-of-state corporations to enter the Maryland market.

Not only is the law clearly anti-competitive, but it is also unique. In *Yamaha,* the Fourth Circuit emphasized that the provision at issue was "uniquely anti-competitive" and that it had "no parallel in the law of any other state." *Yamaha,* 401 F.3d at 571. Maryland is joined only by New Hampshire in prohibiting corporate ownership. Moreover, Professor Harrington, an expert in the economics of the funeral industry, testified that in his opinion the corporate prohibition on funeral homes is the "most blatantly anti-competitive state funeral regulation in the nation." (Harrington Decl. ¶ 35.) The reduction in competition also explains the comparatively excessive cost of a Maryland funeral, which was estimated to be almost $800 more than the national average. (*Id.* ¶¶ 20-30.)

In *Yamaha,* the Fourth Circuit found that when there are "few or no adversely affected in-state interests, *Pike* balancing serves as a check against

legislative abuse." *Yamaha,* 401 F.3d at 569. The Fourth Circuit also discussed the implications where "in-state interests actively seek to protect the burdensome law," *id.* at 573, and found that

> [a]lthough those brave enough to try to open new dealerships are likely to be Virginia residents, these few individuals are sure to be outnumbered and out-gunned by the existing dealers. As a result, there is little political check against the possibility of legislative abuse in the form of motorcycle franchise laws that unduly burden commerce.

Id. at 569. In this case, the in-state interests that have worked to lift ownership restrictions have undoubtedly been "outnumbered and out-gunned," especially considering that the Task Force to Examine the State's Cemetery and Funeral Industry concluded over a decade ago that "Maryland law [should] be changed to allow the issuance of additional corporate licenses for the ownership and operation of funeral homes." Final Report of the Task Force, at 22-23. The Maryland funeral home industry has benefitted from the "most blatantly anti-competitive state funeral regulation in the nation," (Harrington Decl. ¶ 35.), and therefore "'has been mollified' by the economic protection [it] currently enjoy[s]." *Yamaha,* 401 F.3d at 573 (quoting *Clover Leaf,* 449 U.S. at 473 n. 17). Therefore, just as in *Yamaha,* "there is little political check against the

possibility of legislative abuse . . . that unduly burden[s] commerce." *Id.*

This Court has little difficulty in finding that sections 7-309(a) and 7-309(b) of the Morticians Act, which prohibit corporate ownership of funeral homes in Maryland with indefinite exemptions for corporations holding licenses existing as of June 1, 1945, cannot withstand analysis under the *Pike* test and therefore violates the dormant Commerce Clause. The burdens of these provisions are considerable. The corporate prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland. Even if one of the fifty-eight licenses does become available, a prospective out-of-state purchaser must pay an inflated price for the license. The undisputed record in this case indicates that these burdens are intolerable and clearly excessive in relation to any benefits proffered by the Defendants. Consumer protection is obviously a legitimate interest, but Defendants have offered almost no evidence demonstrating that corporate funeral homes pose a discrete risk to the public, and that the corporate prohibition in any way furthers consumer protection. On the contrary, it is quite clear to this Court that Maryland consumers have been harmed by the corporate prohibition of the Morticians Act by being forced to pay funeral prices well in excess of the national average.

CONCLUSION

For the reasons stated above, the cross motions for summary judgment by the parties are each GRANTED IN PART and DENIED IN PART.

Plaintiffs' Motion for Summary Judgment seeking declaratory and permanent injunctive relief is GRANTED as to sections 7-309(a) and 7-309(b) of the Maryland Morticians Act, which this Court finds violate the dormant Commerce Clause. Defendants' Motion for Summary Judgment is DENIED on this ground.

Defendants' Motion for Summary Judgment is GRANTED as to section 7-310 of the Maryland Morticians Act because this Court finds that the licensing scheme is rationally related to a legitimate state interest and does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs' Motion for Summary Judgment is DENIED on this ground.

A separate Order and Judgment follows.

/s/

Richard D. Bennett
United States District Judge

Date: October 17, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*,	*	Civil Action No.: RDB-06-524
Plaintiffs,	*	
v.	*	
DAVID HOVATTER, *et al.*,	*	
Defendants.	*	

* *

ORDER AND JUDGMENT

(Filed Oct. 17, 2007)

For the reasons stated in the foregoing Memorandum Opinion, IT IS HEREBY ORDERED AND ADJUDGED this 17th day of October 2007 that:

1. Plaintiffs' Motion for Summary Judgment (Paper No. 28) is GRANTED IN PART and DENIED IN PART;

2. Defendants' Motion for Summary Judgment (Paper No. 29) is GRANTED IN PART and DENIED IN PART;

3. Sections 7-309(a) and 7-309(b) of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602, which prohibit corporate ownership of funeral homes in Maryland with indefinite exemptions for corporations holding licenses existing as June 1, 1945, violate

the dormant Commerce Clause of the United States Constitution. The Defendants and their successors are hereby ENJOINED from enforcing these two statutory provisions and are hereby ENJOINED from prohibiting and limiting the corporate ownership of funeral homes in Maryland;

4. Section 7-310 of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602, which establishes a licensing scheme for the operation of funeral homes in Maryland, is rationally related to a legitimate state interest and does not violate the Fourteenth Amendment of the United States Constitution;

5. The Clerk of the Court transmit copies of this Order and Judgment and accompanying Memorandum Opinion to counsel for the parties; and

6. The Clerk of the Court CLOSE this case.

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*, Plaintiffs,	*	
v.	*	Civil Action No.: RDB-06-524
DAVID HOVATTER, *et al.*, Defendants.	*	

* *

MEMORANDUM OPINION

(Filed Dec. 11, 2007)

Pending before this Court is a Motion for Amendment of Judgment filed by Plaintiffs Charles Brown, Brian Chisolm, Joseph B. Jenkins, III, and Gail Manuel (collectively "Plaintiffs") regarding this Court's prior Order and Judgment (Paper No. 42) and accompanying Memorandum Opinion (Paper No. 41) on the parties' cross motions for summary judgment. The issue presented by the pending motion has been fully briefed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated below, Plaintiffs' Motion for Amendment of Judgment (Paper No. 43) under Rule 59(e) of the Federal Rules of Civil Procedure is DENIED, as a substantive change to the previous judgment is not required.

Instead, this Court will clarify the scope of its holding because Plaintiffs have argued that it is susceptible to two possible interpretations.

BACKGROUND

The complete factual and procedural background of this case has been fully set forth in this Court's Memorandum Opinion on the parties' cross motions for summary judgment and a lengthy discussion herein is not necessary.

Plaintiffs filed a lawsuit in this Court seeking declaratory and injunctive relief against David Hovatter, in his official capacity as President of the Maryland State Board of Morticians, and Faye Peterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffery Pope, and Vernon Strayhorn, Sr., in their official capacities as members of the Maryland State Board of Morticians (collectively "Defendants"). Plaintiffs sought to have several provisions of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602 (the "Act" or the "Morticians Act"), declared unconstitutional. On April 24, 2007, the parties filed cross motions for summary judgment. (Paper Nos. 28, 29.) On September 10, 2007, this Court conducted a hearing on both motions and, on October 17, 2007, this Court released the Order and Judgment (Paper No. 42) and accompanying Memorandum Opinion (Paper No. 41).

In their Motion for Summary Judgment, Plaintiffs first challenged the licensing requirement of the Morticians Act, which provides that every application for a funeral home in Maryland be signed by a "licensed individual" who is also "the owner or co-owner of the establishment to be licensed." Md. Code Ann., Health Occ. § 7-310(b). Specifically, Plaintiffs challenged the licensing requirement under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[1] This Court held that "section 7-310 of the Morticians Act, which establishes a licensing scheme for the operation of funeral homes in Maryland, is rationally related to a legitimate state interest and does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment." (Mem. Op. 2-3.) Additionally, this Court held that the licensing provision may be imposed on both corporate and non-corporate owners of funeral homes. (*Id.* at 3.)

Next, Plaintiffs challenged the corporate prohibition of the Morticians Act, under which a corporation may not own a funeral home unless it was licensed to do so prior to June 1, 1945. Md. Code Ann., Health Occ. §§ 7-309(a), 7-309(b). Plaintiffs challenged the corporate prohibition, along with the statutory exceptions, under the Due Process and

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[1] Count One of the Complaint, titled "Equal Protection-Licensure," and Count Three, titled "Due Process," form the basis of the Plaintiffs' challenge to the licensing requirement.

Equal Protection Clauses of the Fourteenth Amendment and the dormant Commerce Clause.[2] This Court addressed the Fourteenth Amendment challenge to the corporate prohibition, but did not make any conclusion of law on the matter. (Mem. Op. 18-21.) Instead, this Court held that the corporate prohibition embodied in sections 7-309(a) and 7-309(b) violated the dormant Commerce Clause and enjoined the Defendants from limiting the corporate ownership of funeral homes in Maryland to only those holding an exempt corporate license. (*Id.* at 2.)

On October 31, 2007, Plaintiffs filed a Motion for Amendment of Judgment because of a perceived ambiguity in the Memorandum Opinion. (Paper No. 43.) Within the Motion, Plaintiffs also requested that this Court clarify its holding. On November 19, 2007, Defendants filed a Response (Paper No. 44) and, on November 27, 2007, Plaintiffs filed a Reply (Paper No. 45).

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[2] Count Two of the Complaint, titled "Equal Protection-Corporate Ownership," comprises the Fourteenth Amendment challenge. This Court interpreted Plaintiffs' argument under Count Two to also incorporate the Due Process Clause because cases relied upon by both parties were interchangeably based on both the Equal Protection and Due Process Clauses, and because the standard – rational basis – used to analyze both claims is the same. Count Five, titled "Commerce Clause," forms the basis for the dormant Commerce Clause challenge. There is no corresponding dormant Commerce Clause challenge to the individual licensing requirement in the Complaint, nor was the issue briefed in the parties' submissions or addressed at the hearing.

STANDARD OF REVIEW

Rule 59(e) of the Federal Rules of Civil Procedure provides simply that "[a] motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The United States Court of Appeals for the Fourth Circuit has repeatedly recognized that a judgment may be amended in only three circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). Rule 59(e) does not permit a party to "raise arguments which could have been raised prior to the issuance of the judgment," nor does it enable a party to "argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pacific Ins. Co.*, 148 F.3d at 403.

It is, however, permissible for a district court to clarify a previous judgment under the auspice of Rule 59(e) without necessarily amending it, so long as it is filed within ten days of judgment. *See Capacchione v. Charlotte-Mecklenburg Sch.*, 190 F.R.D. 170, 175 (W.D.N.C. 1995) ("A post-judgment motion for clarification requesting a court to interpret the scope of its injunction is properly made under Rule 59(e)[.]"); *Belair v. Lombardi*, 151 F.R.D. 698, 699 (M.D. Fla.

1993) ("A motion to clarify an order as to the court's intent regarding the continuation of state court proceedings is considered a motion to alter or amend the judgment, under Rule 59(e)."). In an analogous context, the Fourth Circuit has explained that "in cases where a party [subsequently] submits a motion . . . which is unnamed and does not refer to a specific Federal Rule of Civil Procedure, the courts have considered that motion either a Rule 59(e) motion to alter or amend a judgment, or a Rule 60(b) motion for relief from a judgment or order." *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d 395, 400 (4th Cir. 1995). In this case, Plaintiffs specifically refer to Rule 59(e) and have filed their Motion within ten days of judgment.[3] Therefore, to the extent Plaintiffs' Motion to Amend seeks clarification, it is properly filed under Rule 59(e).

ANALYSIS

Plaintiffs have requested an amendment and clarification of this Court's Order and Judgment and accompanying Memorandum Opinion. Specifically,

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[3] Rule 6(a)(2) of the Federal Rules of Civil Procedure provides that weekend days and legal holidays are excluded when computing a time period that is less than eleven days, and Rule 6(a)(1) provides that the date triggering the time period should also be excluded. Plaintiffs filed their Motion for Amendment on October 31, 2007, ten business days after October 18, 2007, the day after this Court rendered its Order and Judgment and accompanying Memorandum Opinion. Plaintiffs' motion was therefore timely under Rule 59(e).

Plaintiffs have requested that this Court clarify whether the Order and Judgment and accompanying Memorandum Opinion "extend[ed] to non-mortician entrepreneurs and companies the same general right to own corporate-licensed funeral homes that was previously available only to those lucky few able to acquire one of Maryland's 58 'grandfathered' corporate funeral homes" or only "enjoined Maryland from denying corporate ownership to Maryland-licensed morticians." (Pls.' Mot. 1.) The latter is the holding of the case.

This Court's analysis of section 7-310 in the Memorandum Opinion addressed only the *individual* licensing requirement, as opposed to the exempt corporate licenses that were subsequently addressed. This was done primarily because the parties continually referred to only section 7-310(b) of the Morticians Act, which, as Plaintiffs point out, literally requires that a *licensed individual* own or co-own a corporate funeral home. *See* Md. Code Ann., Health Occ. § 7-310(b)(2) ("An application for a funeral establishment license shall be signed by a *licensed individual who . . . is the owner or co-owner* of the establishment to be licensed." (emphasis added)).

In addressing whether the licensing scheme, as it relates only to licensed individuals, passed constitutional muster, this Court found that "the Maryland General Assembly could have rationally determined that the public's health, safety and welfare are furthered by requiring that a licensed mortician own the funeral home where mortuary

science is practiced." (Memo. Op. 17.) This Court then found that the surviving spouse and executor licenses – both of which are individual licenses – are insufficient to "strike down the regulatory scheme." (*Id.*) Moreover, this Court expressly held at the outset that the "licensing requirement may be imposed upon corporate and non-corporate *owners* of funeral homes in Maryland," indicating that the "licensing requirement" referred only to licensed individuals, regardless of whether that individual sought to own a corporate or non-corporate funeral home. (*Id.* at 3.)

This Court began its discussion of the corporate prohibition and the exempt corporate licenses by clearly stating that the individual licensing requirement could be applied to corporations under the Due Process and Equal Protection Clauses of the Fourteenth Amendment: "[t]he Maryland General Assembly certainly has a rational basis to require the presence of licensed individuals in the ownership structure of a corporation practicing mortuary science." (Mem. Op. 19.) Thus, a state *may* require that a licensed individual be part of the ownership structure of a corporation in certain highly skilled professions without violating the Fourteenth Amendment as long as the licensing requirement bears a rational relationship to a legitimate state interest. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973) (finding constitutional a state statute that required licensed pharmacists own the majority of shares in a corporation seeking to be licensed to practice pharmacy).

In response to Plaintiffs' Motion for Amendment of Judgment, Defendants have cited (for what appears to be the first time in this litigation) section 7-310(c) of the Morticians Act, which provides that "[t]he Board shall issue a funeral establishment license to a funeral establishment that . . . [w]ill be owned and operated in accordance with this title by at least one licensed mortician or one licensed funeral director, or a holder of a surviving spouse *or corporation license.*"[4] Md. Code Ann., Health Occ. § 7-310(c). Citing this provision and its statutory history, Defendants state in their response that they will *not* require that a licensed individual own or co-own a corporate funeral home, despite this Court's ruling that doing so was permissible under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In their Reply, however, Plaintiffs "worry that once the time for clarifying or appealing this Court's decision has passed, Defendants will interpret this Court's order as not *mandating* that the Board issue 'establishment licenses to new corporate licensees that are not owned by licensed funeral directors or

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[4] This provision appears to be facially inconsistent with the provision cited throughout this litigation, section 7-310(b), which requires that a licensed individual who owns or co-owns the funeral home sign the application, even if the funeral home is a corporation. Section 7-310(c), however, appears to permit a license to be issued to either a licensed individual *or* a corporation, without requiring that the licensed individual own the corporation.

morticians.'" (Pls.' Reply 2 (internal citation omitted.)). Plaintiffs therefore request that this Court declare that Defendants must allow an unlicensed individual to own a corporate funeral home.

Granting Plaintiffs' request would require that this Court amend its previous Judgment and Order, which it declines to do. Plaintiffs have not cited to an intervening change in controlling law, nor has any new evidence been presented. *See Pacific Ins. Co.*, 148 F.3d at 403. Plaintiffs have also failed to demonstrate that an amendment to this Court's prior Judgment and Order is necessary to "correct a clear error of law or prevent manifest injustice." *Id.*

In sum, this Court's prior ruling held that anyone capable of owning a funeral home in Maryland may do so in the corporate form under the dormant Commerce Clause. (*See* Mem. Op. 25-30.) However, Defendants *may,* but are not obligated to, require that a licensed individual own or co-own a funeral home. (*Id.* at 13-19.) If they choose to enforce the Morticians Act in this manner, they will not offend the Due Process and Equal Protection Clauses of the Fourteenth Amendment by enforcing it on corporate and non-corporate funeral homes alike.

Therefore, Plaintiffs' Motion to Amend is DENIED. This Memorandum Opinion serves only to clarify this Court's Order and Judgment (Paper No. 42) and accompanying Memorandum Opinion (Paper No. 41).

CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Amend this Court's Order and Judgment (Paper No. 42) is DENIED. A separate Order follows.

/s/
Richard D. Bennett
United States District Judge

Dated: December 11, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*, Plaintiffs,	*	
v.	*	Civil Action No.: RDB-06-524
DAVID HOVATTER, *et al.*, Defendants.	*	

* *

ORDER

(Filed Dec. 11, 2007)

For the reasons stated in the foregoing Memorandum Opinion, IT IS HEREBY ORDERED this 11th day of December 2007 that:

1. Plaintiffs' Motion for Amendment of Judgment (Paper No. 43) is DENIED;

2. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for the parties; and

3. The Clerk of the Court CLOSE this case.

/s/
Richard D. Bennett
United States District Judge

FILED: April 24, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1121 (L)
(1:06-cv-00524-RDB)

CHARLES BROWN; JOSEPH B. JENKINS, III; BRAIN CHISHOLM; GAIL MANUEL,

Plaintiffs-Appellants

v.

DAVID HOVATTER; FAYE PETERSON; MICHAEL RUCK, SR.; GLADYS SEWELL; DONALD V. BORGWARDT; MARSHALL JONES, JR.; MICHAEL KRUGER; BRIAN HAIGHT; ROBERT BRADSHAW; JEFFREY POPE; VERNON STRAYHORN, SR., in their official capacities as members of the Maryland State Board of Morticians,

Defendants-Appellees

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

U.S. CONST. ART. I, § 8, CL 3

Section 8. The Congress shall have power . . .

to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

* * *

MD. HEALTH OCCUPATIONS
CODE ANNOTATED (2009)

§ 7-101. Definitions

(a) In general. – In this title the following words have the meanings indicated.

(b) Apprentice. – "Apprentice" means an individual licensed by the Board who assists a licensed mortician or funeral director in the practice of mortuary science or funeral direction, under direct supervision of a licensed mortician or funeral director.

(c) Apprentice sponsor. – "Apprentice sponsor" means a person who:

(1) Is a licensed mortician or funeral director practicing mortuary science as a licensed mortician or funeral director in Maryland at least 1 year immediately prior to accepting the applicant as an apprentice; and

(2) Provides direct supervision to an apprentice.

(d) Board. – "Board" means the Maryland State Board of Morticians and Funeral Directors.

(e) Corporation. –

(1) "Corporation" means a mortuary science business whose articles of incorporation are in good standing with the Maryland State Department of Assessments and Taxation, or its successor, the initial business for which the license is issued must have

been incorporated on or before June 1, 1945 and have "Incorporated", "Inc.", or "Corporation" in its name.

(2) "Corporation" does not include, for purposes of issuing a corporation license, a "professional association" (P.A.) or a "professional corporation" (P.C.).

(f) Courtesy card. – "Courtesy card" means a license issued by the Board to licensed practitioners of mortuary science in other states, to make a removal of a dead human body in this State and to return the body to another state or country, to return dead bodies from another state or country to this State, to fill out the family history portion of the death certificate, and to sign the death certificate in the holder's capacity as a licensed practitioner of mortuary science.

(g) Funeral director. – "Funeral director" means an individual who is licensed by the Board to practice all aspects of mortuary science except for embalming.

(h) Funeral establishment. – "Funeral establishment" means any building, structure, or premises from which the business of practicing mortuary science is conducted.

(i) License. –

(1) "License" means, unless the context requires otherwise, a license issued by the Board.

(2) "License" includes, unless otherwise indicated:

(i) A mortician license;

(ii) An apprentice license;

(iii) A funeral director license;

(iv) A surviving spouse license;

(v) A corporation license;

(vi) A funeral establishment license; and

(vii) A courtesy card.

(j) Licensed apprentice. – "Licensed apprentice" means, unless the context requires otherwise, an apprentice who is licensed by the Board to assist a licensed mortician or funeral director in the practice of mortuary science or funeral direction.

(k) Licensed funeral director. – "Licensed funeral director" means, unless the context requires otherwise, a funeral director who is licensed by the Board to practice funeral direction.

(l) Licensed funeral establishment. – "Licensed funeral establishment" means, unless the context requires otherwise, a funeral establishment that is licensed by the Board.

(m) Licensed mortician. – "Licensed mortician" means, unless the context requires otherwise, a

mortician who is licensed by the Board under this title to practice mortuary science.

(n) Licensee. – "Licensee" means an individual or entity licensed by the Board to practice mortuary science to the extent determined by the Board.

(o) Mortician. – "Mortician" means an individual who practices mortuary science.

(p) Practice funeral direction. –

(1) "Practice funeral direction" means:

(i) To operate a funeral establishment;

(ii) For compensation, to prepare a dead human body for disposition; or

(iii) For compensation, to arrange for or make final disposition of a dead human body.

(2) "Practice funeral direction" does not include, for compensation, disinfecting or preserving a dead human body or any of its parts by arterial or cavity injection or any other type of preservation.

(q) Practice mortuary science. –

(1) "Practice mortuary science" means;

(i) To operate a funeral establishment;

(ii) For compensation, to prepare a dead human body for disposition; or

(iii) For compensation, to arrange for or make final disposition of a dead human body.

(2) "Practice mortuary science" includes:

(i) The practice of funeral direction; and

(ii) Disinfecting or preserving a dead human body or any of its parts by arterial or cavity injection.

(3) "Practice mortuary science" does not include the pickup, removal, or transportation of a dead human body, if the unlicensed individual is acting under the direction of a licensed mortician or funeral director.

(r) Pre-need contract. – "Pre-need contract" means an agreement between a consumer and a licensed funeral director, licensed mortician, or surviving spouse to provide any goods and services purchased prior to the time of death. Goods and services shall include:

(1) A service, including any form of preservation and disposition, that a mortician normally provides in the ordinary course of business; or

(2) Merchandise, including a casket, vault, or clothing, that a mortician normally provides in the ordinary course of business.

(s) Surviving spouse. – "Surviving spouse" means the legal widow or widower of a licensed funeral director or licensed mortician, whose license was in good standing at the time of death, and who at

the time of death, wholly or partly owned and operated a mortuary science business.

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§ 7-301. License required; exceptions

(a) In general. – Except as provided in subsection (b) of this section, an individual shall be licensed by the Board before the individual may practice mortuary science in this State.

(b) Exceptions. – This section does not:

(1) Limit the right of a school of medicine or dentistry to use and dispose of a dead human body or its parts;

(2) Limit the right of any person who is authorized by law to handle or dispose of a dead human body or its parts, if the person acts within the scope of that authorization;

(3) Affect the right of an authorized officer or employee of the United States or the District of Columbia to practice mortuary science in the course of that individual's duties;

(4) Apply to an individual who makes funeral arrangements in the course of the duties of that individual as an attorney; or

(5)(i) Limit the right of the Board to issue temporary permits to out-of-state licensed morticians or funeral directors for teaching purposes involving

an approved continuing education program or disaster situations as deemed necessary by the Board.

(ii) A mortician or funeral director who is issued a temporary permit shall be subject to any conditions and limitations that the Board may specify in the permit and the provisions of this title.

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§ 7-303. Qualifications of applicants for mortician or funeral director license

(a) Determination of qualifications by Board. –

(1) The Board shall determine the qualifications necessary for an individual to lawfully engage in the practice of mortuary science or funeral direction and to operate a funeral establishment within this State.

(2) Except as otherwise provided in this subtitle, to qualify for a mortician or funeral director license, an applicant shall be an individual who meets the requirements of this section.

(b) Examinations; issuance of license. – The Board shall examine all applications for licensure for the practice of mortuary science or funeral direction and shall issue the mortician or funeral director license to an individual who:

(1) Is judged to be of good moral character;

(2) Has completed not less than 1 year and not more than 2 years of licensed apprenticeship,

unless the Board allowed extensions for additional 1-year terms;

(3) Except as otherwise provided in this section, has graduated with an associate of arts degree in mortuary science or its equivalent from a school accredited by the American Board of Funeral Service Education or approved by the Board, or has acquired at least an associate of arts degree and completed a course in mortuary science that is accredited by the American Board of Funeral Service Education or approved by the Board;

(4) Has passed the national board examination administered by the Conference of Funeral Service Examining Boards of the United States;

(5) Except as provided in subsection (c) of this section, has passed a written examination on Maryland law and regulations governing the practice of mortuary science and a practical examination demonstrating competency in the preparation of dead human bodies for final disposition and sanitary science; and

(6) Has submitted an application to the Board on the required form and has paid a fee set by the Board.

(c) License to practice funeral direction. – For an individual applying for a license to practice funeral direction, the practical examination qualification

under subsection (b)(5) of this section may not include demonstrating competency in embalming.

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§ 7-305. Waiver of requirements

(a) Authorized. – Subject to the provisions of this subsection, the Board may waive the examination and apprenticeship requirements of § 7-303 of this subtitle and issue a mortician or funeral director license to an applicant who is licensed to practice mortuary science or funeral direction in any other state.

(b) Conditions. – The Board may grant a waiver under this subsection only if the applicant:

(1) Pays the license fee required by the Board under § 7-303 of this subtitle;

(2) Was a licensed mortician or funeral director in good standing in the other state;

(3) Serves an apprenticeship consisting of 1,000 hours; and

(4) Passes the Maryland State written examination administered by the Board.

(c) Reciprocity. – The Board may grant a waiver only if the state in which the applicant is licensed:

(1) Grants a similar waiver to licensees of this State; and

(2) Has standards for a mortician or funeral director license that are not lower than those of this State.

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§ 7-308. Surviving spouse license

(a) Issuance. – Subject to the provisions of this section, the Board shall issue a surviving spouse license to an applicant if the applicant:

(1) Is the surviving spouse of a licensed mortician or licensed funeral director whose license was in good standing at the time of death and who at the time of death was operating and wholly or partly owned a mortuary science business;

(2) Is not a licensed mortician or licensed funeral director;

(3) Submits to the Board, within 30 days of the death of the licensed mortician or funeral director, written verification of the death of the licensee and the application required by the Board; and

(4) Pays a fee set by the Board.

(b) Examination. –

(1) Within 6 months of the issuance of the surviving spouse license, the applicant must take the written Maryland State law examination administered by the Board under § 7-304(b), (c), (d)(1), (e), and (f) of this subtitle,

(2) The license becomes null and void if the surviving spouse fails the Maryland State law examination twice.

(3) An applicant may retake the law examination as often as necessary to fulfill the requirement of this subsection.

(c) Sale of business. – Nothing in this section shall prevent a surviving spouse from selling the mortuary science business that was operated and wholly or partly owned by the licensed funeral director or licensed mortician.

(d) Scope. – Except as provided in subsection (c) of this section, while a surviving spouse license is effective, it authorizes the licensee to:

(1) Continue the operation of the mortuary science business that had been operated and wholly or partly owned by the spouse of the licensee; and

(2) Assist with the planning and conducting of funeral services for that mortuary science business.

(e) Conditions. – The Board may issue a license under this section only if:

(1) The business is operated under the direct supervision of a licensed mortician or funeral director; and

(2) The embalming is done by a licensed mortician.

§ 7-308.1. Executor license

(a) In general. – A personal representative of a deceased mortician's or funeral director's estate shall be licensed by the Board before continuing operation of the mortuary science business.

(b) Requirements. – The Board shall issue an executor license to an applicant if the applicant:

(1) Is the appointed personal representative of a deceased mortician's or funeral director's estate in accordance with the requirements established in Title 5 of the Estates and Trusts Article;

(2) Submits to the Board, within 30 days of the death of the licensed mortician or funeral director, written verification of the death of the licensee, written verification of appointment as a personal representative, and the application required by the Board; and

(3) Pays a fee set by the Board.

(c) Sale of business permitted. – Nothing in this section shall prevent a personal representative from selling the mortuary science business that was operated and wholly or partly owned by the licensed funeral director or licensed mortician.

(d) Authorized activities. – Except as provided in subsection (c) of this section, while an executor license is effective, it authorizes the licensee to:

(1) Continue operation of the mortuary science business that had been operated and wholly

or partly owned by the deceased mortician or funeral director; and

(2) Assist with the planning and conducting of funeral services for that mortuary science business.

(e) Licensed mortician required. – The Board may issue a license under this section only if:

(1) The business is operated under the direct supervision of a licensed mortician or funeral director; and

(2) The embalming services are provided by a licensed mortician.

(f) Expiration. – Notwithstanding the provisions of § 7-314 of this subtitle, an executor license is valid for six months from the date of issuance and may not be renewed or reinstated after expiration.

(g) Continuation after expiration. – A personal representative who wishes to continue operation of a mortuary science business upon expiration of the executor license must qualify and be licensed as a mortician or a funeral director, or be the holder of a surviving spouse or corporation license.

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§ 7-309. Corporation license

(a) In general. – Except as otherwise provided by law, a corporation may not operate a mortuary science business and the Board may not issue a

license to or list any corporation as licensed to operate a mortuary science business.

(b) Exception. – The Board may renew only the license of a corporation that:

(1) On June 1, 1945, held a license issued by this State;

(2) Has been renewed continuously since that date;

(3) Submits an application on a form required by the Board; and

(4) Pays a fee set by the Board.

(c) Contents of application. – Each application for renewal made by a corporation shall state the name and address of each officer and director of the corporation.

(d) Scope of license. – While a corporation license is effective, it authorizes a corporation to operate a mortuary science business only if any practice of mortuary science that is conducted for the corporation is practiced by a licensed individual.

(e) Branch establishments. – A corporation may not operate a branch funeral establishment unless the branch funeral establishment was in operation on or before October 1, 1964.

(f) Sale, bankruptcy, or cessation of operations. – If a corporation is sold, declares bankruptcy, or

ceases to operate, written notice must be submitted to:

(1) The Board, within 2 weeks of the occurrence, detailing the changes and the arrangements for carrying out the pre-need contracts and disbursement of the money held in escrow; and

(2) The holders of pre-need contracts advising them of their options under Maryland law.

---

§ 7-310. Funeral establishment license

(a) License required; restrictions. –

(1) A funeral establishment shall be licensed by the Board before the establishment may be used for the preparation of the remains, viewing, and conducting of services.

(2) The licensee may be restricted to operations as determined by the Board.

(b) Application. –

(1) To apply for a funeral establishment license, an applicant shall:

(i) Submit an application to the Board on the form that the Board requires; and

(ii) Pay to the Board:

1. An application fee set by the Board; and

2. The fee established under § 7-4A-05(a) of this title.

(2) An application for a funeral establishment license shall be signed by a licensed individual who is not an apprentice but is the owner or co-owner of the establishment to be licensed.

(c) Issuance. – The Board shall issue a funeral establishment license to a funeral establishment that:

(1) Has complied with all applicable State and local laws;

(2) Will be owned and operated in accordance with this title by at least one licensed mortician or one licensed funeral director, or a holder of a surviving spouse or corporation license; and

(3) Will be held responsible for any and all activities performed on the premises.

(d) Name on license to appear on signs and advertisements. – Signs and advertisements of a funeral establishment shall display the name that appears on the establishment license.

Supreme Court, U.S.
FILED
OCT 26 2009
OFFICE OF THE CLERK

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No. 09-231

IN THE
Supreme Court of the United States

CHARLES BROWN, *et al.*,
Petitioner,

v.

DAVID HOVATTER, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly conclude that a long-standing State enactment limiting funeral business licenses to individual applicants, rather than corporations, does not violate the dormant Commerce Clause, where there was no showing that the requirement either discriminated against or unjustifiably burdened interstate commerce?

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STATEMENT OF THE CASE

Proceedings Below

After repeatedly and unsuccessfully lobbying the Maryland General Assembly for legislative action, four individuals, each of whom operates a funeral or cemetery business in Maryland, brought this lawsuit challenging the constitutionality of a seventy-year-old provision of a State statute, which generally requires that a mortician or funeral director license be held by an individual rather than a corporation. The complaint asserted equal protection, due process, and dormant Commerce Clause challenges to the limits on corporate licenses set forth in the Maryland Morticians and Funeral Directors Act (the "Act"), codified at Md. Code Ann., Health Occupations §§ 7-101 to 7-602 (2005 Repl. Vol. and 2008 Supp.); *see* §§ 7-309(a), 7-309(b). App. 100-01. Separate counts of the complaint also asserted equal protection and due process claims with respect to § 7-310 of the Act, which requires that each licensed funeral establishment must be owned and operated by at least one licensed mortician or funeral director. App. 102-03.

On cross-motions for summary judgment, the district court rejected all of the equal protection and due process claims. App. 46-57. As to the dormant Commerce Clause claim, the district court determined that the Act does not discriminate against interstate commerce in either its purpose or effect. Specifically, the district court found that "there is simply no evidence of discriminatory purpose," and the Act "regulates evenhandedly by treating in-state and out-of-state interests the same." App. 60 n.16, 62. Nevertheless, the district court concluded that the Act's limits on corporate licensing violated the dormant Commerce Clause on the ground that the

burden on interstate commerce exceeded the putative local benefits. App. 63-69.

The Court of Appeals for the Fourth Circuit affirmed the district court's denial of the equal protection and due process claims, App. 4, 24-28, and the petitioners do not seek further review of that portion of the rulings below. The court of appeals reversed the district court's decision as to the dormant Commerce Clause claim. App. 4, 11-24. Noting that the plaintiffs advanced "no contention" that "the Morticians Act discriminates against interstate commerce," App. 13, the court of appeals conducted the balancing analysis set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). App. 13-24. The court of appeals concluded that the Act "does not violate the dormant Commerce Clause" because it "does not place a barrier or burden on the flow of interstate commerce," and any arguable "incidental burden would not be excessive in light of the putative benefits from the Act's regulation." App. 21.

Regulation of the Funeral Profession in Maryland

The State of Maryland has regulated the funeral profession since 1902, when the General Assembly created the State Board of Undertakers, required licensing of undertakers, and specified the criteria for obtaining such a license. *See* 1902 Md. Laws, ch. 160. Though the original legislation applied only in Baltimore City, statewide licensing requirements were established by 1910. *See* 1904 Md. Laws, ch. 389; 1908 Md. Laws, ch. 496; 1910 Md. Laws, ch. 399. In 1924, the legislature also required that embalmers become licensed. *See* 1924 Md. Laws, ch. 575.

In the early years of regulation, Maryland law permitted corporations to be licensed as undertakers. *See* Md. Code Ann., art. 43, § 297 (1924 & Supp. 1935). In 1937, after nationwide calls for more effective regulation of the funeral industry, the General Assembly adopted various amendments that included limits on licensing of corporations. The legislation amended sections 290 through 309 of Article 43 to create the State Board of Funeral Directors and Embalmers, establish different requirements for licensing, and substitute the term "funeral director" for "undertaker." *See* 1937 Md. Laws, ch. 503. The 1937 amendments required "any person, co-partnership or corporation . . . licensed to carry on the business of Funeral Directing in the State of Maryland at the time of the passage of this Act" to register with the Board; required the Board to issue licenses to those persons and entities that registered; and provided for the annual renewal of those licenses. *Id.* The provision that is most pertinent to this case amended section 306 of Article 43 to provide as follows:

> The Board shall not hereafter issue licenses to, nor register any corporation, nor shall any corporation be permitted to conduct the business or profession of Funeral Directing which has not already been licensed and registered.

In 1945, to address the needs of servicemen and women and their families, the General Assembly authorized the Board to issue a license to any corporation that was "formed during World War II to carry on the business of any person who was licensed as a funeral director and was engaged in the business of funeral directing or embalming at the time of induction into the Armed Forces of the United States during World War II," as long as the corporation was

owned and operated by family members of the soldier. *See* 1945 Md. Laws, ch. 741.

In 1962, the legislature again revised the statutes regulating funeral directors and embalmers to create a single license for funeral directing and embalming. *See* 1962 Md. Laws, ch. 129. In 1971, upon determining that the premises used for funeral directing and embalming should also be licensed, the General Assembly created the funeral establishment license for that purpose. *See* 1971 Md. Laws, ch. 443. Under the revised statute, only licensed funeral directors and embalmers could obtain a funeral establishment license. *Id.*

Following the 1962 creation of the unified license for funeral directing and embalming, the Board issued the new unified license to some practitioners, but continued to issue funeral director licenses to others. To resolve the situation, the Act was amended in 1980 to prohibit the practice of the unified occupation of funeral directing and embalming without a license and to permit licensees who held funeral director licenses to continue to renew those licenses. *See* 1980 Md. Laws, ch. 330. In 1981, the State Board of Funeral Directors and Embalmers was renamed the State Board of Morticians. *See* 1981 Md. Laws, ch. 8, § 2. The legislation also discontinued the use of the term "embalmer" and adopted the term "mortician" as the appropriate title for licensees of the new Board. *Id.*

Today, the provisions of the Act are codified in title 7 of the Health Occupations Article ("Health Occ.") of the Maryland Code. The express purpose of the Act and each of its provisions is the protection of the health and welfare of the public. *See* Md. Code Ann., Health Occ. § 7-103. To accomplish that purpose, the Act establishes a State Board of

Morticians and Funeral Directors (the "Board"), which consists of 11 members, including six licensed morticians or funeral directors and five consumer members who are not employed by or affiliated with the funeral industry. Health Occ. §§ 7-202(a), 7-202(d). The Board has responsibility for licensing morticians, funeral directors, and funeral establishments; investigating alleged violations of the Act; enforcing the provisions of the Act; inspecting licensed funeral establishments; and establishing standards for the practice of mortuary science. *See* Health Occ. §§ 7-201, 7-205.

The Act defines four principal types of license: mortician, funeral director, apprentice, and funeral establishment. *See* Health Occ. §§ 7-302, 7-306, 7-310. To become a licensed mortician or funeral director, an applicant must complete an apprenticeship and appropriate education courses, pass written national and state examinations, and pass a practical examination. *See* Health Occ. § 7-303. Section 7-306 lists the requirements for an apprentice license, and § 7-310 provides that only a licensed funeral director or mortician may obtain a funeral establishment license. The requirements for a licensed funeral establishment are further specified in the Board's regulation promulgated as Code of Maryland Regulations ("COMAR") 10.29.03.04. One other type of license, a corporation license, is available only to those entities that held such a license before the legislature changed the licensing law to prohibit the issuance of new licenses to corporations. *See* Health Occ. § 7-309.

The Petitioners' Efforts to Secure Passage of Legislation to Expand Corporate Licensing in the Funeral Profession

Petitioners Charles Brown and Gail Manuel each own a cemetery in Maryland, but neither is a licensed mortician. App. 6-7. Petitioners Brian Chisholm and Joseph Jenkins are licensed morticians, each of whom owns his own funeral home business in Maryland. *Id.* Mr. Chisholm is the only plaintiff who does not reside in Maryland. Mr. Chisholm runs his Maryland funeral business from his home in Florida. *Id.* Each of the petitioners has expressed a desire to form a corporation and to effect a merger between an existing funeral home business and a cemetery. *Id.*

In 1996, the Maryland General Assembly created the Task Force to Examine the State's Cemetery and Funeral Industry. *See* 1996 Md. Laws, ch. 209. Petitioners Charles Brown and Joseph Jenkins were both members of the Task Force. *Id.* The Task Force's final report included a recommendation that corporations be permitted to practice mortuary science in Maryland. *Id.*

Every year from 1997 through 2005, legislation was introduced to permit the issuance of some additional corporate licenses. Petitioners Brown, Jenkins, and Chisholm lobbied or testified in favor of each of these bills.

In recent years, the legislature has considered and rejected at least thirteen such bills, each of which took a slightly different approach to amending the statute. *See* 2004 Session, S.B. 340; 2004 Session, H.B. 795, H.B. 1341; 2003 Session, H.B. 956; 2002 Session, H.B. 1113; 2001 Session, H.B. 1036; 2001 Session, H.B. 1464; 2000 Session, H.B.188, H.B. 503;

1999 Session, H.B. 107, H.B. 475; 1998 Session, H.B. 591; 1997 Session, H.B. 1321.

Recent Maryland Legislation Addressing the Funeral Profession

Although the legislature has declined to relax licensing requirements in the manner favored by the petitioners, in 2007 the General Assembly revised those requirements to establish the funeral director license. *See* 2007 Md. Laws, chs. 185, 186. This license category was added to accommodate professionals who, for religious or personal reasons, prefer not to be trained or licensed to embalm bodies. The adoption of the funeral director license also benefits out-of-state funeral directors who are not trained in embalming, by enabling them to become licensed in Maryland. The General Assembly also has responded to constituent concerns by enacting recent legislation to create a guarantee fund for all pre-need contracts, as a means of protecting consumers from sharp practices in the funeral home industry. *See* 2008 Md. Laws, ch. 532.

The Current Makeup of the Funeral Profession in Maryland

As of April 24, 2007, there were 870 active mortician licenses, 17 active funeral director licenses, and 283 funeral establishment licenses issued by the Board of Morticians. App. 37. Of those 283 funeral establishment licenses, 11 were held by surviving spouse licensees, 214 were held by licensed morticians or funeral directors, and 58 were held by corporate licensees. *Id.* Thirty of the 58 corporate licenses were owned by publicly held corporations and national chains, and 28 were privately held by Maryland corporations. App. 6.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. The Court of Appeals' Decision Does Not Conflict With Any Decision of Another Federal Court of Appeals or State Court of Last Resort.

Further review of this case is unwarranted because the petition does not identify any decision of another federal court of appeals or a state court of last resort that actually conflicts with the conclusion reached by the Fourth Circuit Court of Appeals in this matter. Though laws limiting professional licenses to individual licensees, rather than corporations, are typical of licensing schemes for lawyers, physicians, and other professions throughout the various States, the petition does not cite a single decision of a federal appellate court or a state high court disagreeing with the Fourth Circuit's holding that such an individual licensing requirement does not offend the dormant Commerce Clause.

The purported split of authority suggested by the petitioners is not a genuine conflict. Differences among the multiple appellate decisions cited in the petition are primarily attributable to the respective courts' application of established constitutional principles to widely divergent facts and diverse regulatory schemes.[1] Of the supposedly conflicting

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[1] For example, among the disparate circumstances and regulatory schemes addressed in the cases cited by the petitioners are a State law preventing automobile manufacturers from owning

decisions cited in part I of the petition, only one found a dormant Commerce Clause violation, *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992). Unlike this case, in which the challenged statute is conceded to be nondiscriminatory, *Gov't Suppliers* involved a waste-hauling regulation that was found to "discriminate in

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dealerships, *Ford Motor Co. v. Texas Dep't of Transportation*, 264 F.3d 493 (5th Cir. 2001)(rejecting dormant Commerce Clause challenge on the ground that plaintiff failed to show either discrimination or any actual burden on interstate commerce); a State law preventing insurance companies from affiliating with savings and loans, *Ford Motor Co. v. Muir*, 874 F.2d 926 (3d Cir. 1989)(same); a local ordinance requiring scrap metal dealers to "tag and hold" scrap metal for a 10-day period, *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009) (same); a State statute requiring that attorneys who act as trustees with respect to in-state real property must maintain an office in the State, *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009)(same); a State statute requiring automobiles sold or leased in state to have a "bumper quality label" stating the results of impact tests, *Ass'n of Int'l Auto. Manufrs, Inc. v. Abrams*, 84 F.3d 602 (2d Cir. 1996)(remanding on the ground that factual dispute precluded summary judgment); a State statute limiting the number of other items that may be hauled in trucks used to haul municipal waste, *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) (finding a dormant Commerce Clause violation because the statute had a direct, discriminatory effect on interstate commerce).

practical effect against interstate commerce," and, therefore, was "subject to the higher level of scrutiny" required for discriminatory regulations. *Id.* at 1279. *See Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008) (a "discriminatory law is 'virtually *per se* invalid'")(citation omitted).

At most, the petition adumbrates some possible variation in language or emphasis in the cited opinions, but these do not amount to a conflict that is outcome determinative. Notably absent from the petition is any discussion of appellate court decisions that have either acknowledged or discussed the supposed split of authority described in the petition. The absence of such an illuminating discourse in the appellate case law indicates that the purported conflict remains, at most, an inchoate difference of approach that has not percolated sufficiently to warrant this Court's review at this time.

B. The Court of Appeals' Decision Does Not Conflict With Any Relevant Decision of This Court.

Nor does the petition purport to show that the holding of the court of appeals below conflicts with the holding in any relevant decision of this Court. On the contrary, the petition faults the court of appeals for *adhering* to this Court's precedents. *Compare* Petition at 14 (criticizing this Court's decision in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), and its application of *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)) *with* court of appeals' decision at App. 16, 18-19, 22 (applying *Exxon*, 437 U.S. at 126-28, and *CTS Corp.*, 481 U.S. at 93). The "confusion" that petitioners purport to find in these precedents, Petition at 12, 14, is belied by this Court's recent case law, which indicates no such doubt as to their meaning or proper application. *See*

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth'y, 550 U.S. 330, 344 (2007)(quoting *Exxon*, 437 U.S. at 127, for the proposition that the "Commerce Clause does not protect 'the particular structure of method of operation' of a market"). As the petition itself acknowledges, the decision in this case does not conflict with the holding of the other Supreme Court decision cited by the petitioners, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). *See* Petition at 10 (acknowledging that "*Lewis* did not expressly hold" the proposition for which the petitioners cite it, *i.e.* "that interstate investment capital and professional expertise are articles of commerce").

C. The Court of Appeals Properly Applied Established Principles Governing Commerce Clause Challenges.

Thus, as the petition effectively confirms, the court of appeals followed this Court's precedents in determining that Maryland's Morticians and Funeral Directors Act does not violate the dormant Commerce Clause. *See* App. 11-14 (citing *Dennis v. Higgins*, 498 U.S. 439, 447 (1991); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989); *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. at 1808; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *Oregon Waste Sys., Inc. v. Dep't of Envrt'l Quality of Oregon*, 511 U.S. 93, 98 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. at 142).

The court of appeals first observed that the Act does not "purport to regulate activity outside Maryland." App. 14. The court then determined that the Act does not discriminate against interstate commerce because it "does not treat persons from out-of-state any differently than persons in-state," and the Act permits those corporate licenses that are

authorized to be owned by "any person or corporation, out-of-state or in-state," including "publicly-held out-of-state corporations." App. 15. The petition does not challenge any of these portions of the court of appeals' ruling.

The court of appeals then determined that the Act does not unjustifiably burden interstate commerce because the Act's limits on corporate licensing address only "'the particular structure or methods of operation in a retail market'" and do not "'prohibit the flow of interstate goods, place added costs upon them,'" or otherwise affect "the flow of articles of commerce across state lines." App. 16, 19 (quoting *Exxon*, 437 U.S. at 127, 126). The court concluded that, even if the Act were deemed to place some incidental burden on commerce, that incidental burden "is not excessive and is justified by the very real benefits of protecting the public health, safety, and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that business and creating accountability to regulators and to clients." App. 23-24.

To support this conclusion, the court of appeals noted that "promoting familiarity between an owner and his business in a licensed and regulated industry" has been recognized by this Court as "a legitimate local interest." App. 22 (citing *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973)). The court of appeals also cited this Court's finding that a State "'has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing.'" App. 22 (quoting *CTS Corp.*, 481 U.S. at 93). To further demonstrate that the Act's general insistence on individual rather than corporate licensing "provides individual liability and therefore more direct accountability for owners of funeral

establishments," the court of appeals quoted from the plaintiffs' own statement that "they desire to use the corporate form because they 'want to be insulated from personal liability for . . . negligence.'" App. 23.

Therefore, the court of appeals applied established precedent to reach a reasonable conclusion that does not warrant the exercise of this Court's discretionary review.

CONCLUSION

For the reasons stated, the petition should be denied.

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In The

Supreme Court of the United States

CHARLES BROWN, *et al.*,

Petitioners,

v.

DAVID HOVATTER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Taming the parochial impulses of individual states has been among the nation's chief concerns – and challenges – since the founding. Under the Court's dormant Commerce Clause doctrine, states may neither discriminate against nor unduly burden interstate trade. But states have strong incentives to skirt that doctrine, and they have learned to do so by winking at the letter of the Court's jurisprudence while defying its spirit. That is precisely what Maryland has done in this case, and the Respondents' brief in opposition neither rebuts that fact nor offers any persuasive reason why the Court should not take this opportunity to address an area of critical and increasing confusion among the lower courts.

1. Respondents' lengthy and mostly irrelevant exegesis on the history of funeral regulation in Maryland cannot obscure what the Respondents themselves candidly admitted in their briefing below: namely, that the state's restrictions on corporate ownership of funeral homes have prevented the Maryland funeral industry "from becoming as saturated by national chains as the rest of the national market."[1] Based on its review of the undisputed fact record, which the panel did not challenge even though it applied a different (and erroneous) legal analysis, the district court concluded that the corporate ownership restriction imposes "intolerable and clearly

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[1] Br. of Appellees/Cross-Appellants at 15.

excessive" burdens on the interstate market by "severely limit[ing] the ability of out-of-state businesses from opening a funeral home in Maryland." App. 69.

Thus, Maryland has done precisely what this Court's dormant Commerce Clause doctrine forbids, namely, rendered itself a virtual island in the multi-billion-dollar stream of national funeral commerce. The question is whether this case presents a particularly attractive vehicle for clarifying specific aspects of the Court's dormant Commerce Clause jurisprudence. For the reasons stated in the Petition and briefly summarized below, we believe it does.

2. The Petition should be granted. The panel reached the startling conclusion that commerce-burdening laws are immune from challenge under the dormant Commerce Clause as long as they restrict only the interstate flow of investment capital and services, rather than physical goods. App. 21. Not only does this holding irreconcilably conflict with decisions of this Court and other courts of appeal, but it also raises an issue of extraordinary public importance because an interconnected national economy – which is the touchstone of the Court's dormant Commerce Clause doctrine – will be impossible in the 21st century if states are permitted to erect protectionist barriers to the free movement of capital and services.

The Respondents have no answer to this in their opposition brief. They do not even try to refute the

Petitioners' argument that the Fourth Circuit decision conflicts with *Lewis v. BT Investment Managers, Inc.*, 477 U.S. 27, 38-39 (1980), in which the Court struck down a Florida statute that forbade out-of-state banks from doing precisely what out-of-state funeral businesses want to do here: invest capital and services into a local market.[2] Instead, the Respondents wanly assert that *Lewis* does not really count because it did not technically hold that investment capital and services are articles of commerce for the purposes of the dormant Commerce Clause. Opp. 11.

But that is a distinction without a difference. The reason *Lewis* and a plethora of circuit decisions have never expressly held that investment capital and services are articles of commerce is because it surely never occurred to anyone to doubt that they are. Indeed, the two-judge majority in this case declared *sua sponte* that investment capital and services are not articles of commerce even though no one – Petitioners, Respondents, or the district court – ever raised that possibility, much less briefed it.[3] In this

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[2] Nor do Respondents even try to distinguish the appellate decisions the Petitioners cite, Pet. 11 n. 3, in which the courts of appeal have invalidated local laws that unconstitutionally burden the interstate movement of investment capital or services.

[3] It is hardly surprising that the Respondents do not argue in favor of the panel's misconception here, presumably because they are keenly aware that the Federal Trade Commission minutely regulates purely "local" funeral home operations in contexts that have nothing to do with the physical movement of funeral goods across state lines. *See* 16 C.F.R. § 453.1 *et seq.* If,

(Continued on following page)

respect, everyone in this case – except two judges on the Fourth Circuit panel – agreed with this Court in *Lewis* that it is so obvious that investment capital and services are articles of commerce that that fact does not even bear mentioning.

Review is further warranted because the panel decision also conflicts with *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and the Respondents' argument on this point illustrates the confusion over what *Exxon* means. According to the Respondents, Opp. 10-11, the panel below, App. 16, and two circuit decisions,[4] *Exxon* stands for the proposition that the dormant Commerce Clause absolutely never, under any conceivable circumstances, applies to laws affecting the "particular structure or method of operation in a market." 437 U.S. at 127.

But that is most emphatically not what *Exxon* says. *Exxon* simply says that showing an impact on

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as the Fourth Circuit held, investment capital and services in the funeral industry truly fall outside the dormant Commerce Clause, then they also necessarily fall outside the affirmative power of Congress to regulate, and those FTC regulations are now unconstitutional in the Fourth Circuit. *See, e.g.*, *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (compiling cases establishing that the dormant and affirmative Commerce Clauses are coextensive).

[4] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001) (car manufacturers forbidden from owning dealerships); *Ford Motor Co. v. Muir*, 874 F.2d 926, 944-45 (3d Cir. 1989) (insurers forbidden from affiliating with savings and loan companies).

how an interstate business operates – without showing anything more – does not violate the Commerce Clause because the Commerce Clause protects the interstate market, not particular businesses or their method of operation in the market. The absolutely critical fact in *Exxon* is that the plaintiffs in that case failed to adduce *any* evidence showing that the challenged law actually burdened interstate commerce, as opposed to just burdening the plaintiffs' businesses. This Court acknowledged in *Exxon* that had the plaintiffs' established that the restrictions on their chosen method of doing business affected the interstate market in petroleum, then the case may have come out differently. 437 U.S. at 126 n.16. Thus, *Exxon* simply stands for the uncontroversial proposition that to prevail on a dormant Commerce Clause claim one must prove a burden on interstate commerce.

Because Respondents do not understand this, they mistakenly claim in their brief in opposition that this Court essentially reaffirmed their incorrect reading of *Exxon* in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 344 (2007). Opp. 11. But that is not true at all. *United Haulers* is exactly like *Exxon* in that there was no proof that interstate commerce was burdened. *Compare United Haulers*, 550 U.S. at 337 ("On remand and after protracted discovery, a Magistrate Judge and District Court found that the haulers did not show that the ordinances imposed *any* cognizable burden on interstate commerce.") (emphasis in original) *with Exxon*, 437 U.S. at 123

("There was . . . no evidence that the total quantity of petroleum products shipped into Maryland would be affected by the statute.").

The panel decision of the Fourth Circuit conflicts with *Exxon* and *United Haulers* because, unlike in those latter cases, the record in this case contains unrebutted evidence of significant burdens on the interstate market for investment capital and services as a direct result of Maryland's restrictions on funeral home ownership by corporations. It is these demonstrable burdens on interstate commerce that trigger the dormant Commerce Clause. The Petitioners are not now claiming, nor have they ever claimed, that they are entitled to relief simply because Maryland's laws affect their preferred way of doing business.[5] The Court should grant review to clarify that restrictions on the structure or form of doing business can in fact violate the dormant Commerce Clause, but only when there is an actual burden on the interstate market and not simply a burden on the plaintiff.[6]

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[5] Professor David Harrington presented unrebutted expert testimony that the rate of investment into Maryland by the national funeral chains is drastically lower than it is in other states while the proportion of locally owned funeral homes is significantly higher than it is in other states. This sort of impact on the interstate market is what the Court said the petroleum companies in *Exxon* needed to prove, but did not, to trigger the dormant Commerce Clause doctrine. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 n.16 (1978).

[6] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90-94 (1987), continues to exacerbate the confusion over *Exxon*

(Continued on following page)

3. There is even less to say about the circuit split over proper application of the *Pike* test because the Respondents' assertion that the split is nothing more than "an inchoate difference of approach" is both unsupported and entirely unpersuasive. Opp. 10. The point remains that four circuits unambiguously require actual evidence of local benefits under *Pike* and four circuits unambiguously permit unsupported speculation instead. *See* Table inserted at Pet. 22-23 (documenting circuit split).

Moreover, as explained in the Petition, the panel below certainly did not "follow[ ] this Court's precedents" in applying *Pike* to the challenged restrictions. Opp. 11. To the contrary, the panel not only credited asserted local benefits that were "no more than entirely speculative," App. 65-66 (internal quotations and citation omitted), but it never even mentioned the third and final step of the *Pike* test, which asks whether the state could have achieved its objectives as well "with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142. Indeed, so substantial was the panel's departure from *Pike* that it actually created an intra-circuit split by accepting, for the first time in Fourth Circuit history, purely speculative local benefits for which no actual evidence was offered. *Compare* App. 23-24 (not

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because that decision seemingly invoked *Exxon* for the erroneous proposition that state regulation of the form or structure of doing business are in fact outside the Commerce Clause. But, as noted above, that is not what *Exxon* says.

identifying any evidence that Maryland funeral home owners demonstrate "greater familiarity" with the day-to-day workings of their businesses or are actually "more accountable" to regulators) *with Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *Medigen of Ky., Inc. v. Public Serv. Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993) (all striking down state laws on basis of government's failure to provide actual evidence of local benefits or absence of less burdensome means).

The brief in opposition does not remotely challenge the fact that there is disarray among and within the circuits over a very basic, very important question: does the *Pike* test have any independent force or has it simply become rational basis review by another name? There are four circuits on one side of that question, four circuits on the other, and at least three that appear to vacillate, including the Fourth Circuit. *See* Table at Pet. 22-23. It seems unlikely that more disarray in the circuits will shed more light or meaningfully assist the Court in resolving what has crystallized into an admittedly difficult, but nevertheless perfectly clear, question of constitutional law.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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OCTOBER TERM,

CHARLES BROWN, ET AL.,
Petitioners,

v.

DAVID HOVATTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

No. 09-231

CHARLES BROWN, ET AL.,

Petitioners,

v.

DAVID HOVATTER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL CEMETERY, CREMATION, AND FUNERAL ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus is the International Cemetery, Cremation, and Funeral Association ("ICCFA"). Founded in 1887, ICCFA is a voluntary trade association with over 7,200 members, including non-profit, for-profit, religious and municipal cemeteries, funeral homes,

crematories, and memorial retailers.[1] The ICCFA's activities include tracking federal and state legislation affecting the death care industry. ICCFA promotes consumer choice, the prearrangement of funeral and burial decisions, and open competition among providers of death care services. At least 97% of ICCFA's members are corporations, each of whom is effectively barred from entering the Maryland death care market as a result of Maryland's unique statute prohibiting corporate ownership of funeral homes.

ICCFA is concerned that the Maryland Morticians and Funeral Directors Act (the "Maryland Morticians Act"), Md. Code Ann., Health Occ. § 7-101, et. seq., impedes the free flow of commerce and adversely impacts the interests of both ICCFA members and consumers. ICCFA also fears that the decision of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") provides protectionist interests with a blueprint for stifling the competitive national market for death care that very gradually has begun to emerge in recent decades.

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[1] Amicus curiae notes that counsel of record for all parties received notice of ICCFA's intention to file this brief. This brief is filed with the written consent of all parties. Pursuant to Sup. Ct. R. 37.6, amicus notes that no part of this brief was authored by counsel for any party. Amicus also notes that no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity other than amicus or its members made such a monetary contribution.

SUMMARY OF ARGUMENT AND BACKGROUND FACTS

A. Factual Background

In the United States, the death care industry, which provides funeral, burial, crematory, memorialization and related services, generates gross revenues conservatively estimated at $14 billion per year.[2] Maryland licensed funeral homes and the fifty-eight grandfathered Maryland corporations collectively share Maryland's portion of this substantial annual revenue.

Until almost the end of the twentieth century, the death care industry in the United States consisted almost entirely of small, independent, family-owned businesses operating out of a single location and sometimes serving customers over multiple generations. These small businesses often operated in a less-than-competitive market. Consumers had to select funeral homes, cemeteries, and other vendors quickly in the traumatic days after the death of a family member, leaving little time or inclination for comparison shopping. Moreover, there often were few competitors in many markets, and would-be competitors may have informally respected each other's *de facto* territories.[3]

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[2] U.S. Census Bureau, *Industry Statistics Sampler, NAICS 8122, Death Care Services* (2002), *at* http://www.census.gov/econ/census02/data/industry/E8122.HTM.

[3] *See* FTC, *Funeral Industry Practices: Final Staff Report to FTC and Proposed Trade Regulation Rule* (Bureau of Consumer Protection 1978) (hereinafter "*Final Staff Report to FTC*"), *available at* http://www.ftc.gov/bcp/rulemaking/funeral/finstaffrept.pdf.

Beginning in approximately the 1980's, however, the death care industry gradually experienced significant change. Some changes increased consumer choice as new service providers entered the market and existing providers expanded the range of services they offered. For example, providers began combining functions to allow "one-stop shopping" for consumers of death care. Cemeteries acquired or established funeral homes and crematories, while funeral homes established crematories and acquired cemeteries. Casket manufacturers and casket retailers began selling directly to consumers, bypassing funeral homes.[4]

Other changes increased consumer knowledge and encouraged competition. For example, the Federal Trade Commission sought to empower and protect consumers by the promulgation of its "Funeral Rule," a regulation established for the express purpose of ensuring that consumers receive information necessary to make informed purchasing decisions, and to lower existing barriers to price competition in the market for funeral goods and services.[5]

Perhaps most significantly, changes occurred in the ownership of death care providers. Many firms established operations at multiple locations and in multiple states, sometimes leading to large national or international enterprises. As one scholar has

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[4] *See* GAO, *Funeral-Related Industries: Complaints and State Laws Vary, and FTC Could Better Manage the Funeral Rule, Report to Congressional Requesters*, GAO/GGD-99-156 (1999), *available at* http://www.gao.gov/archive/1999/gg99156.pdf.

[5] 16 C.F.R. pt. 453; *see also* 47 Fed. Reg. 42,260 (Sept. 24, 1982).

noted, "[w]here most deathcare establishments had been relatively small and locally owned (or, at most, small chains), the 1990's saw a rapid growth of mega-corporations with nationwide and international holdings."[6] For example, by the mid-1990's, Service Corporation International ("SCI") reportedly operated 2,882 funeral home locations, 345 cemeteries and 150 crematoria.[7] Similarly, the Loewen Group, Inc. ("Loewen") grew within a decade from 42 funeral homes and one cemetery in 1987 to "950 funeral homes and 289 cemeteries throughout Canada, the United States and Puerto Rico."[8] Stewart Enterprises, Inc. ("Stewart") reportedly acquired in fiscal year 1996 alone "134 funeral homes and 15 cemeteries in 22 international and domestic markets."[9] In short, outside of Maryland, the death care industry has been significantly penetrated by interstate corporations.

As in other industries, use of the corporate form has been an indispensable prerequisite to the interstate growth of the death care industry. Indeed, regardless of whether they are small family-run operations or part of the operations of a large national chain, the majority of funeral homes in the

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6 William G. Whittaker, *Funeral Services: The Industry, Its Workforce, and Labor Standards, CRS Report for Congress* 6 (2005), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/206.

7 *Id.* at 8.

8 *Id.* at 9. Loewen later became the Alderwoods Group and was subsequently acquired by SCI.

9 Thus, it is no longer true to speak of a "Mom and Pop" industry comprised of small independent providers. Rather, the industry is becoming increasingly competitive, diverse and interstate in character.

United States are owned by corporations.[10] As the District Court recognized, operating a business as a corporation has several well-known advantages:

- Free transferability;
- Limited liability;
- Tax advantages;
- Perpetual existence; and
- Superior ability to raise capital through stock sales.[11]

Capitalizing upon these advantages, corporations operating across state lines have helped transform the death care industry into a more competitive and nationwide industry. While barriers to entry and abusive practices still exist, it is far different from the localized, fragmented market it was even twenty years ago.

Nevertheless, while the death care industry as a whole has made significant strides towards the establishment of a free and competitive national market, local protectionist obstacles still impede the flow of commerce. As the Federal Trade Commission's Bureau of Consumer Protection has stated:

> [M]any restrictive state regulations operate not to provide badly-needed

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[10] *See Brown v. Hovatter*, 516 F. Supp. 2d 547, 554 (D. Md. 2007) (noting that *at least* "fifty-one percent of funeral homes nationwide are registered in the corporate form.") (hereinafter "*Brown I*"). As the District Court explained, fifty-one percent represents the lowest possible percentage of incorporated funeral homes; the actual percentage might well be higher. *Id.* at n.11.

[11] *Id.*

> information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition .... Many of the laws create barriers to entry into the occupation and to the offering of low cost funeral services.[12]

These protectionist measures take many forms. Historically, some states have prohibited cemeteries from providing funeral home services.[13] Others have forbidden cemeteries from selling monuments.[14] And, in at least four states, only licensed funeral directors may sell caskets.[15] While some protectionist statutes have been invalidated by courts,[16] many remain on the books to the detriment of consumers.

B. Regulatory Capture in Maryland

The Maryland death care market, like the national market, long has been plagued by protectionism and barriers to entry that decrease competition, increase prices and burden the free flow of interstate commerce. The Maryland Morticians Act's

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[12] *Final Staff Report to FTC* at 103.

[13] *See* Mich. Comp. Laws Ann. § 339.1812; N.Y. Gen. Mun. Law § 166; Conn. Gen. Stat. § 20-230; 24 Del. Code Ann. § 3119; 32 Me. Rev. Stat. Ann. § 1403; N.H. Rev. Stat. Ann. § 325:48; R.I. Gen. Laws § 5-33.2-9; Wis. Stat. § 157.067.

[14] *See, e.g.*, Mass. Gen. Laws ch. 114, § 430; N.J. Stat. Ann. § 45:27-16.

[15] La. Rev. Stat. Ann. §§ 37:831, 37:848(c); Okla. Stat. Ann. tit. 59, §§ 396.2(2)(d), 396.2(10) & 396.6; S.C. Code Ann. §§ 40-19-20(12), 40-19-20(18) & 40-19(30); Va. Code Ann. §§ 54.1-2800 & 54.1-2805.

[16] *See, e.g., Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000).

prohibition on corporate ownership is one such device. As the District Court accurately noted, "[t]here is no question that the [Maryland] Morticians Act, and especially the provision restricting corporate ownership, is at a minimum a protectionist piece of legislation."[17] In practice, the statute effectively insulates Maryland from the emerging competitive and nationwide death care market by preventing interstate providers – providers who necessarily are formed as corporations – from competing with Maryland licensed entities.

As Todd Zywicki, former Director of the FTC's Office of Policy Planning explained, the Maryland Morticians Act appears to be:

> an effort to create governmentally imposed barriers to entry in the funeral home industry and thereby to transfer wealth to a discrete, well-organized interest group at the expense of consumers of funeral home services and the public at large. The result of this regulation is reduced competition in the provision of funeral home services and higher prices and reduced choice in funeral home products and services for consumers.[18]

Mr. Zywicki's opinions are supported by the empirical evidence. Only twenty-one percent of funeral homes in Maryland are owned by corporations, as opposed to at least fifty-one percent registered as corporations nationwide.[19] This is not

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[17] *Brown I*, 516 F. Supp. 2d at 561.

[18] *Id.* at 553.

[19] *Id.* at 554.

surprising given that, as a result of the Mortician's Act, non-Maryland entities who desire to enter the Maryland market must pay a premium of $150,000 to $200,000 to acquire one of the fifty-eight grandfathered corporate licenses, assuming such a license is even available for sale.[20] It also is unsurprising that, as a result of decreased competition resulting from this barrier to entry, Maryland consumers pay an estimated $800 more for a funeral than the national average.[21]

Repeated efforts have been made to repeal such protectionist legislation in Maryland and allow more open competition in the Maryland death care industry. These reform efforts, however, consistently have been opposed and thwarted by the Maryland State Board of Morticians (the "SBM") and the State Funeral Directors Association (the "MSFDA"). The former regulatory body is comprised of eight licensed morticians and four consumer members.[22] Seven of the eight morticians on the SBM also are members of the MSFDA.[23] Moreover, at the time of the District Court's decision, two of the members of the SBM had a direct interest in maintaining the ban on corporate ownership.[24] Thus, the regulators who enforce Maryland's regulation of the death care industry, and who have prevented the repeal of the Maryland Mortician Act's ban on corporate ownership, hardly are disinterested observers.

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20 *Id.* at 553.

21 *Id.* at 554.

22 *Id.* at 553.

23 *Id.*

24 *Id.*

Indeed, the Maryland funeral industry presents a classic case of what public choice economists call "regulatory capture."[25] Regulatory capture occurs when members of a regulated occupation come to dominate the regulatory and law-making process in their field.[26] Members of a regulated industry will devote considerable resources over time to achieving control of the regulated industry to exclude competitors and charge artificially high prices. In fact, the pressure for regulating an occupation typically comes from within the occupation itself, and this phenomenon is especially pronounced in the area of licensed professions.

ICCFA submits that the Maryland Morticians Act is not a statute that protects consumer interests or furthers some other legitimate regulatory purpose. Instead, it represents a transparent barrier to entry adopted and maintained as a result of "regulatory capture" in Maryland.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION UNREASONABLY BURDENS INTERSTATE COMMERCE AND REFLECTS FLAWED ASSUMPTIONS REGARDING THE MODERN FUNERAL SERVICES INDUSTRY

The Fourth Circuit's decision is significant in its own right for its detrimental impact both upon Maryland consumers and upon corporations seeking to enter the Maryland death care market. The case

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[25] *See id.*

[26] *Id.*

assumes far greater significance, however, when viewed against the backdrop of the national death care industry – an industry historically plagued by anti-competitive behavior and barriers to entry but that has increasingly become more competitive and national in character. It is reasonable to assume that those opposed to competition will seize upon the Fourth Circuit's decision as a "how-to" manual for enacting legislation to stifle emerging interstate competition in the death care industry, and perhaps in other industries as well. Such a result would disserve the public interest and be inconsistent with the Commerce Clause. ICCFA therefore urges the Court to grant the Petition and reverse the Fourth Circuit's decision.

A. The Death Care Market No Longer is a Localized Market

As Petitioners argue, the Fourth Circuit's attempt to carve-out an exception to the Dormant Commerce Clause for regulations affecting only the flow of capital, but not goods or services, is contrary to decisions in other Circuits. But of perhaps equal importance, the Fourth Circuit's decision also fails to recognize that the interstate flow of goods and services in the modern funeral industry is necessarily and directly impacted by regulations impeding the flow of capital.

The Fourth Circuit mistakenly based its opinion on the false proposition that the "Morticians Act purports to regulate an industry that is inherently local, not interstate, in nature."[27] Starting from this flawed premise, the Court of Appeals goes on to

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[27] *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009) (hereinafter "*Brown II*").

conclude that the Morticians Act "does not address, nor thereby affect, the flow of any goods or articles of commerce across state lines," and that "the burden of this regulation . . . falls on Maryland consumers, not on interstate commerce."[28] In short, the Fourth Circuit analyzed the Maryland Morticians Act as if it regulated an industry composed entirely of local businesses providing a purely local service to Maryland consumers. But its anachronistic analysis is belied by significant developments in the death care industry that have taken place over the last few decades.

Although the Fourth Circuit's description of the death care market as inherently localized may have been accurate in 1970, or perhaps even in 1990, it no longer holds true today. As explained above, changes in the last half-century have transformed the death care industry outside of Maryland into an emerging competitive and interstate market. Consolidation within the industry means that, outside of Maryland, small family-owned businesses now face competition from national chains such as SCI and Stewart, as well as from numerous relatively small firms operating in more than one state. The Maryland Morticians Act unreasonably and intrusively burdens this interstate competition by excluding corporate participants from the Maryland market. What the Fourth Circuit characterized as a restriction merely on the flow of capital necessarily translates into a significant burden on the interstate flow of funeral goods and services.

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[28] *Id.* at 364-366; *see also id.* at 364 ("the service provided through the practice of mortuary science begins and ends within the State.").

The Fourth Circuit also misconceives the interstate nature of commercial transactions in today's death care industry. Obviously, Maryland funeral homes are directly involved in the sale of many goods in interstate commerce – caskets being the most obvious example. But the payment for death care also necessarily involves interstate commerce. Maryland consumers pay for death care through interstate credit card transactions. Equity funds and bonds located outside Maryland are used to fund funerals paid in advance of need. Thus, the death care and goods provided in Maryland necessarily involve interstate commercial transactions.

B. By Accepting Purely Speculative Benefits as Justification for the Corporate Ownership Ban, the Decision Below Invites the Adoption of Further Legislation Burdening the Flow of Commerce

ICCFA also urges the Court to review the Fourth Circuit's decision because of the dangerous precedent it provides to protectionist interests in other states. The Fourth Circuit accepted at face value Maryland's contention that the prohibition on corporate ownership serves the state's interest of insuring accountability. [29] As the District Court noted, however, this claim is flatly belied by the State's exemption of fifty-eight grandfathered corporations

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[29] *See, e.g., Brown II*, 561 F.3d at 367-68 ("[W]e conclude that the Morticians Act's incidental burden on interstate commerce is not excessive and is justified by the very real benefits of protecting the public health, safety and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that business and creating accountability to regulators and clients.").

from the ban.[30] Thus, Maryland's "claims of consumer protection concerns appear to be no more than 'entirely speculative.' "[31]

If the Fourth Circuit's decision is permitted to stand, other jurisdictions remain free to adopt regulations based on speculative benefits unsupported by empirical evidence. Moreover, these efforts could extend beyond the death care industry. For example, a state legislature could decide to protect independent "Mom and Pop" restaurants from competition with national chains by prohibiting corporate ownership. The ostensible purpose of such regulation would be to insure greater accountability to public health officials of those involved in the preparation and sale of food to consumers. Under the Fourth Circuit's reasoning, this form of regulation would be upheld despite its significant burden upon interstate commerce and blatant protectionist agenda.

III. The Fourth Circuit's Decision is Inconsistent with Federal Regulation of the Death Care Industry

Decisions of this Court long have recognized that the negative and affirmative commerce clauses are equal in scope. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-574 (1997). Federal regulation of the death care industry therefore should be co-extensive with the protections of the dormant commerce clause. However, by concluding that the Maryland Morticians Act is a "local regulation of a localized profession where

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30 *Brown I*, 516 F. Supp. at 563.

31 *Id.*

services are performed for clients entirely in Maryland," [32] the Fourth Circuit implies that Congress lacks the authority under its affirmative commerce clause power to regulate the local funeral industry. This is both unfortunate and contrary to longstanding federal regulatory history.

In fact, Congress long has exercised its right under the commerce clause to regulate the funeral industry. In particular, the Federal Trade Commission's Funeral Rule, which went into effect on April 30, 1984, comprehensively regulates the disclosures made to consumers when making death care purchasing decisions.[33] For example, the Funeral Rule specifies that it is an unfair or deceptive act or practice for a funeral provider to: (1) fail to furnish consumers with accurate price information disclosing the costs of each funeral good or service used in connection with the disposition of dead bodies; [34] (2) require consumers to purchase a casket for direct cremations; [35] (3) condition the provision of any funeral good or service upon the purchase of any other funeral good or service;[36] or (4) embalm the deceased for a fee without authorization.[37] The rule also sets forth required price and information disclosures.[38] Following the Fourth Circuit's flawed analysis, the areas of funeral services regulated by

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32 *Brown II*, 561 F. 3d at 366.

33 *See* 16 C.F.R. pt. 453.

34 16 C.F.R. § 453.2(a).

35 *Id.* § 453.4(a).

36 *Id.* § 453.4(b).

37 *Id.* § 453.5(a).

38 *Id.* §§ 453.2, 453.3.

the Funeral Rule could be interpreted as local and not interstate in nature, thereby rendering the Funeral Rule unenforceable in the Fourth Circuit. ICCFA believes this could not have been the intention of the Fourth Circuit, but that only a decision by this Court can remove any uncertainty caused by the decision below.

CONCLUSION

For the reasons set forth above, Amicus ICCFA respectfully urges the Court to grant certiorari and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. The Commerce Clause forbids states from making or enforcing laws that burden interstate commerce excessively relative to the laws' putative local benefits. A Maryland law forbidding corporate ownership of funeral homes places substantial burdens on interstate commerce because it makes it impracticable for residents of other states to participate in the domestic funeral home market. Is the law immune from Commerce Clause scrutiny because it restricts the interstate flow of capital rather than the flow of goods or services?

2. When applying the *Pike* test, should courts defer to a state's assertion that the law serves important local interests?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts. PLF's Economic Liberty Project defends the individual's right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts in cases like these. PLF attorneys successfully represented the plaintiff in the important occupational licensing case *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), and participated as amicus curiae in such cases as *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), and *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). PLF attorneys have also published extensively on the subject of economic liberty and the abuse of the law for protectionist purposes. *See, e.g.*, Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

14 Wm. & Mary Bill Rts. J. 1023, 1027 (2006); Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457 (2004). PLF believes its public policy experience will assist this Court in its consideration of the petition for certiorari.

SUMMARY OF REASONS FOR GRANTING THE PETITION

States often use limits on corporate ownership to burden interstate competition in favor of in-state interests. *See, e.g., Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008), *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006). In *Pike v. Bruce Church*, 397 U.S. 137 (1970), this Court formulated a balancing test for evaluating the constitutionality of state laws that burden interstate commerce but that do not explicitly discriminate against out-of-state interests. Under that test, a court must judge whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. This balancing test was created to protect the "area of free trade among the several States," *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

Unfortunately, courts and commentators are now in disarray as to when that test applies. That confusion is attributable to this Court's decision in *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), which appeared to create a threshold test barring consideration of the *Pike* factors whenever a law burdening interstate commerce "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state

companies in the retail market." *Id.* at 126. Relying on this language, the court below held that the Dormant Commerce Clause applies only to laws that interfere with the interstate flow of goods and services, not to laws that restrict out-of-state business practices, no matter how disproportionate their burden on interstate commerce.

Yet this Court has never held that such laws are exempted from *Pike*'s balancing test. Indeed, in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), which remains valid law, this Court did apply *Pike* balancing to a law that restricted business practices rather than the actual flow of goods. This Court should therefore grant certiorari for three reasons:

1. The Court should reconcile *Pike*, *Hunt*, and *Exxon*, to clarify whether a state law that significantly burdens out-of-state businesses in a manner that is disproportionate to its purported local benefits, but which does not limit the flow of actual goods and services, is subject to Dormant Commerce Clause scrutiny. *Exxon* and *Hunt* conflict on this issue: *Exxon* refused to apply the *Pike* balancing test, while *Hunt* did apply it. The Court should take the opportunity to clarify that the same, meaningful scrutiny applies to *all* state economic restrictions that burden interstate commerce disproportionately to local benefits.

2. The Court should clarify that the *Pike* test requires courts to scrutinize a challenged law's "putative local benefits," 397 U.S. at 142, with more skeptical scrutiny than the deferential standard employed by the court below. If courts apply a rational basis-style deference to a state's assertions that a challenged law advances an important local interest,

then states will face no serious limit on their ability to burden interstate commerce for the benefit of in-state interests. *Pike* balancing enables courts to determine whether local benefits predominate over the burden on interstate commerce or whether those local benefits are minor or pretextual. *See, e.g.*, *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005), *cert. denied sub nom. Smit v. Yamaha Motor Corp., U.S.A.*, 546 U.S. 936 (2005) ("A statute need not be perfectly tailored to survive *Pike* balancing."). But deference to a state's assertions that a law advances important local interests would swallow up the balancing required by *Pike*: it would mean that the balance would always tip in favor of the protectionist law. This would transform the Commerce Clause into a mere formalism, emptying it of real protective force. *Cf. Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433 (1947) ("What lifts the [dormant commerce clause] from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences.").

The Dormant Commerce Clause has always imposed a more serious limit on state restrictions of interstate commerce than the Fourth Circuit recognized here. This Court has long read the Commerce Clause as barring states both protectionist acts, whether explicit or implicit, "forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). The balancing test established in *Pike* is crucial to that effort. Yet, due to the conflict between *Exxon* and *Hunt*, it remains unclear whether that test applies in a case like this, where the challenged law restricts not the flow of goods and services, but the method by which interstate commerce is conducted.

and does so in a manner that provides protectionist benefits to in-state interests. These complex issues have generated enough inter-circuit conflict to warrant review by this Court.

ARGUMENT

I.

THE COURT SHOULD RESOLVE WHETHER THE DORMANT COMMERCE CLAUSE PROTECTS THE UNHINDERED FLOW OF INTERSTATE COMMERCE OR ONLY THE INTERSTATE FLOW OF GOODS AND SERVICES

A. This Court Has Frequently Applied *Pike*'s Dormant Commerce Clause Test to Laws Burdening Interstate Commerce, Even If Those Laws Do Not Diminish the Actual Flow of Goods and Services

1. The Commerce Clause Protects Interstate Commerce, Including Investment as Well as the Trade in Goods and Services

"[T]he Framers of the Commerce Clause had economic union as their goal." *Dennis v. Higgins*, 498 U.S. 439, 454 (1991). The framers intended that every citizen should have "free access to every market in the Nation" and know "that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H. P. Hood & Sons, Inc. v.*

Du Mond, 336 U.S. 525, 539 (1949). By removing the power to control interstate commerce from the states, and giving that power exclusively to Congress, the framers hoped to create "a national free market." *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992).

This Court's Dormant Commerce Clause jurisprudence has never explicitly distinguished between the interstate flow of goods and services on one hand and the interstate flow of capital and investment on the other. Yet the decision below turns on such a distinction; it asserts that while "burdens placed on the interstate movement of goods, materials, or other articles of commerce" are subject to Dormant Commerce Clause scrutiny, a prohibition on corporate ownership that restricts or eliminates the freedom of out-of-state investors to participate in the Maryland market is "not [a] matter[] protected by the dormant Commerce Clause." *Brown v. Hovatter*, 561 F.3d 357, 365 (4th Cir. 2009).

Goods and services bought and sold across state lines are only the most obvious examples of interstate commerce. But commerce in the national marketplace routinely involves trading money, securities, and other intangible economic values. In fact, goods frequently *are* capital investments, *see* George Reisman, *Capitalism: A Treatise on Economics* 445-46 (1996), and there is no textual or historical basis for distinguishing between one and the other for purposes of the Dormant Commerce Clause doctrine. This Court has often treated investment purchases the same as other kinds of goods in cases involving Dormant Commerce Clause challenges. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977). The question in these cases is whether a state

commercial regulation creates something like a tariff against out-of-state businesses—not whether the regulation ultimately decreases the in-state consumer's access to products and services.

2. *Pike*'s Balancing Test Should Apply to All Types of Trade, Including Matters Involving Investment

In *Pike*, an Arizona law required cantaloupes exported across state lines to be shipped in packages of an approved design. 397 U.S. at 139-40. The state claimed this restriction did not interfere with interstate commerce, *id.* at 140-41, and that the state had a legitimate interest in ensuring that produce sent out of Arizona was of good quality. *Id.* at 142-43. The law did not actually restrict the shipment of goods or impose a tax on exports, but it limited the method of doing business in a way that diverted trade, imposed higher business costs on out-of-state businesses, and did so in service of a "minimal" state interest. *Id.* at 146. The Court weighed the burden the statute imposed on interstate commerce against its putative local benefits, and concluded that it erected an invalid barrier against interstate trade. *Id.* at 145-46.

In *Boston Stock Exch.*, this Court found that a special transfer tax imposed by New York on investment securities purchased in other states was unconstitutional because it "impose[d] a greater tax liability on out-of-state sales than on in-state sales," *id.* at 332, and caused "the flow of securities sales [to be] diverted from the most economically efficient channels and directed to New York. This diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free

trade purpose of the Commerce Clause." 429 U.S. at 336.

New York argued that the tax did not affect out-of-state transactions, because it was only imposed when securities changed hands within the State of New York. Yet the practical effect of the tax was to give a competitive edge to security purchases inside of New York, at the expense of other states. The state was using its taxing power to " 'requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere.' " *Id.* (quoting *Pike*, 397 U.S. at 145). The Second Circuit Court of Appeals summed up these cases in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001), when it said that "[a] regulation may disproportionately burden interstate commerce if it has the practical effect of *requiring out-of-state commerce to be conducted at the regulating state's direction*," (emphasis added).

These cases indicate that the Dormant Commerce Clause does not merely forbid states from creating tariffs or other barriers against the shipment of goods or the provision of services; rather, it forbids states from enacting laws that burden interstate commerce to a degree that is disproportionate to the local benefits the state claims are served by the law. Thus, restrictions that interfere with investments and with other business operations can violate the Commerce Clause where they form an unreasonably serious barrier against cross-border commercial activity—whether it be purchases, investments, or other commercial activity.

Yet in this case, the court of appeals concluded that Dormant Commerce Clause scrutiny does not

apply *at all* to a law that, by limiting the ownership of funeral homes to Maryland-licensed individuals, practically forbids out-of-state investors from participating in the funeral services market. Certiorari is warranted to determine whether state restrictions on the interstate flow of capital are subject to the same Dormant Commerce Clause scrutiny as are other types of state-created barriers to commerce.

B. This Court's Decision in *Exxon* Seemed to Hold, in Conflict With *Hunt*, That the *Pike* Test Does Not Apply to Laws That Burden Interstate Commerce If Those Laws Do Not Disrupt the Flow of Goods and Services

The court below concluded that the Dormant Commerce Clause did not restrict Maryland's power to control "the manner of professional practice," even if those controls imposed a burden on interstate commerce that was disproportionate to local benefits. 561 F.3d at 365. Thus even if Maryland's law limiting the ownership of funeral homes exclusively[2] to individuals licensed as funeral directors has minimal local benefits had a maximal impact on interstate commerce, it would be immune from Dormant Commerce Clause review.

The court of appeals based its conclusion on this Court's decision in *Exxon*, 437 U.S. 117, a case in which this Court rejected a Commerce Clause challenge to a Maryland law that did not facially discriminate against out-of-state businesses, but had

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[2] Except for the 58 corporations grandfathered in under the 1945 statute prohibiting corporate ownership.

a significant effect on interstate commerce. That law imposed certain divestiture requirements on gasoline refiners and forbade them from charging some of their retailers less than others for gasoline. 437 U.S. at 119-20. The refiners argued that the law burdened interstate commerce because it would cause some refiners to stop selling gasoline in Maryland and because it discriminated against refiners located in states other than Maryland.

The Court rejected the Dormant Commerce Clause challenge, and declined to use the *Pike* test, observing that while some refiners might withdraw from the Maryland market, this would only cause other refiners to enter the market to supply existing retailers. Thus the actual flow of products would not be disturbed. As the Court wrote, "particular interstate firms" are not protected by the Commerce Clause; that provision only protects "the interstate market." *Id.* at 127. *Exxon* appeared to create a special category of Dormant Commerce Clause cases: if "[t]he source of the consumers' supply" is made up by another supplier, *id.*, rather than being curtailed or eliminated, a state restriction that imposes disproportionately heavy burdens on out-of-state businesses is not subject to the *Pike* test. *Exxon* "came as a shock to believers in balancing." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1234 (1986).

Exxon contrasted with the earlier case of *Hunt*, 432 U.S. 333, which used *Pike* balancing to strike down a North Carolina law barring apple sellers from using any quality rating system except the one established by the USDA, if those apples were shipped in closed containers. *Id.* at 337. The law meant that apple

sellers from Washington who shipped their apples in containers could not employ Washington rating terms like "fancy" or "extra fancy." *Id.* at 348-49. This increased the cost of business for Washington apple sellers in North Carolina. *Id.*

The law was facially neutral, *id.* at 352, and there was no indication that the supply of apples was actually diminished by it.[3] Indeed, like the laws challenged in the present case and in *Exxon*, the North Carolina apple regulation did not restrict the flow of goods or services, or apply solely to out-of-state businesses, but did restrict business methods in a way that disproportionately burdened out-of-state firms. Nevertheless, the Court applied the *Pike* test. 432 U.S. at 350. This was consistent with the decision in *Boston Stock Exch.*, 429 U.S. at 336, issued the same year, which held that economic regulations are subject to analysis under *Pike* when they "requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere."

Thus the question remains whether the *Pike* test is appropriate when the challenged law does not restrict the actual flow of products or services, but burdens interstate commerce by limiting how out-of-state businesses may practice their trade. *Hunt* appears to hold that the test is applicable; *Exxon* that it is not.

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[3] There also appears to be no reason to think the shipment packaging requirement struck down in *Pike* wold have reduced the interstate flow of cantaloupes, yet the Court found that requirement invalid under the Commerce Clause. *See* Regan, *supra*, at 1238 n.337.

C. This Conflict Over When *Pike* Balancing Applies Has Caused Significant Confusion Between the Courts of Appeals and Even Within the Fourth Circuit

Exxon did not overrule *Hunt*, but distinguished it in a way that has caused substantial confusion. *See* Regan, *supra*, at 1236; Brannon P. Denning, *Reconstructing Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417, 464-67 (2008) (The contrast between *Exxon* and *Hunt* is "particularly troublesome for those who attempt to extrapolate principles from them."). The *Exxon* Court held that *Hunt* was inapplicable because the North Carolina apple regulation "raised the cost of doing business for out-of-state dealers, and, in various other ways, favored the in-state dealer in the local market," but the restrictions on gasoline dealers did not give any kind of "competitive advantage over out-of-state dealers." 437 U.S. at 126. Yet, in a footnote, the Court acknowledged that "[i]f the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market," the regulation "may have a discriminatory effect on interstate commerce." *Id.* at 126 n.16. Thus *Exxon* left undecided the question presented in this case: whether Dormant Commerce Clause scrutiny applies to a restriction that raises the cost of doing business for out-of-state companies, and has the effect of giving an economic advantage to local firms in the total sales market, but does not reduce the actual flow of goods and services into the state.

The Seventh Circuit recently expressed much confusion in *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), over whether to use the *Exxon* approach, or apply *Hunt* and *Pike*. *See, e.g., id.* at 556 ("That makes us wonder just what work *Pike* does."). The Sixth Circuit, also uneasy as to which approach to use, observed in *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 554 (6th Cir. 2001), that *Exxon* revealed "a willingness on the part of the Supreme Court to engage in some fairly fine slicing and dicing of the practical effects of state legislation in order to avoid the necessity of finding the legislation discriminatory" and "manifest[ed] an obvious reluctance to push cases such as *Hunt* . . . to their logical extremes." And in *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398-99 (9th Cir. 1995), the Ninth Circuit concluded that *Exxon* controlled—but proceeded to apply the *Pike* balancing test, evidently overlooking the fact that when *Exxon* applies, *Pike* balancing does not.

This confusion has led to inconsistent results and "furnished subsequent courts with a convenient way to avoid striking down state laws in close cases." Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 Urb. Law. 907, 929 (2005). For example, the decision below conflicts directly with the First Circuit's decision in *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), and the Eleventh Circuit's decision in *Island Silver & Spice*, 542 F.3d 844.

In *Rullan*, the court struck down a Puerto Rico statute that required new pharmacies to obtain approval from the Secretary of Health. 405 F.3d at 52.

But when a new pharmacy sought approval, the Secretary was required to notify the existing pharmacies and allow them to object, whereupon the applicant was subjected to a hearing to evaluate the effect the new competition would have on existing businesses. *Id.* at 53. This undeniably anti-competitive statute was facially neutral, *id.* at 55, and did not disrupt the flow of goods or services across state lines. *Id.* at 57 n.5. Yet it created a significant barrier against new companies entering the Puerto Rico market, *id.* at 57, and, like the Maryland funeral home law, gave protectionist benefits to existing in-state pharmacies which were grandfathered in. *Id.* at 54-56. Although the law "treat[ed] 'newcomers' equally, it [gave] an on-going competitive advantage to the predominantly local group of existing pharmacies," *id.* at 58, and allowed the Secretary to "protect[] the mostly local group of existing pharmacies from competitive pressure. That the Secretary subjects all newcomers to this discriminatory scheme does not ameliorate the constitutional infirmity." *Id.*

The court of appeals explicitly rejected the argument that *Exxon* should control, and applied *Pike* instead. "Unlike *Exxon*," the panel wrote, where "the only result of the statute would be to 'cause some business to shift from one interstate supplier to another,' the statistics in this case strongly suggest that the Act helps to perpetuate local dominance of the Puerto Rico pharmacy market." *Id.* at 59. Yet this suggests that the choice of applicable constitutional principle hinges on the quality of statistical evidence submitted to the court regarding the economic forecasts of out-of-state business firms. Whether the legal analysis should depend on such a quantitative

difference is questionable, and *Rullan* has already been criticized on this ground by at least one court. *See Fla. Transp. Serv., Inc. v. Miami-Dade County*, 543 F. Supp. 2d 1315, 1327 (S.D. Fla. 2008).

Island Silver & Spice also conflicts with the Fourth Circuit's analysis in this case. There, the Eleventh Circuit invalidated an ordinance barring national chain stores within a municipality. Like the Maryland funeral home law, that ordinance did not prohibit the flow of products or services, but merely regulated the manner in which businesses could operate within the jurisdiction. 542 F.3d at 846. Although the ordinance was facially neutral, its practical burden was laid disproportionately upon interstate trade. *Id.* at 846-47. Thus the case would appear to fall within the *Exxon* category, yet the court applied the *Pike* test. *Id.* at 847-48.

The most striking example of the confusion in lower courts over the applicability of *Pike* lies in the contrast between this case and another Fourth Circuit decision, *Yamaha Motor Corp.* That case, markedly similar to *Rullan*, struck down a Virginia law that protected motorcycle dealerships against competition by allowing existing dealers to block the opening of a new dealership. 401 F.3d at 563-64. The law was facially neutral and bore at least some relationship to a legitimate state interest. *Id.* at 568. Although it caused a reduction in competition between brands of motorcycle, *id.* at 572, there was no indication that the law restricted the flow of motorcycles to consumers. Thus, as in *Exxon*, the Virginia statute arguably limited only the method of business operations within the state, and not the flow of goods and services. Yet, just as the Fourth Circuit in this case did not cite *Hunt*

or *Pike*, the Fourth Circuit in *Yamaha* did not cite *Exxon*. Instead, it proceeded to apply the *Pike* balancing test, holding that the test is appropriate "where interstate commerce is burdened by a state law that imposes barriers to market entry." *Id.* at 573.

Yamaha's similarity to the present case is striking: in both cases, a facially neutral state law restricting the types of businesses that may operate in the market imposed a heavier toll on out-of-state interests than in-state interests, and whatever the effect on the flow of goods and services, it seriously restricted the ability of businesses to enter the market and compete.[4] Yet the *Yamaha* panel, citing *Hunt*, applied *Pike* to balance the burden on interstate commerce against the putative local benefits. *Id.* Thus the confusion over the applicability of *Pike* balancing has led to inconsistent results even within the Fourth Circuit.

This Court should grant review to reconcile *Exxon* and *Hunt*, and clarify when *Pike*'s balancing test applies to facially neutral state economic regulations that impose especially heavy burdens on out-of-state interests, and create protective barriers around in-state interests. *Exxon* seems to hold that *Pike* does not apply when the restriction affects only the method of doing business rather than the actual flow of goods and services. But *Hunt* and *Pike* invalidated facially

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[4] The panel below distinguished *Yamaha* on the grounds that it "was aimed at the *interstate flow* of motorcycles into Virginia," 561 F.3d at 366. But the *Yamaha* court went out of its way to note that the statute was facially *neutral*. 401 F.3d at 568. Although the costs fell predominantly on out-of-state interests, thanks to the benefits accorded to in-state interests, *id.* at 573, this is equally true of the law challenged here.

neutral restrictions which did not limit the flow of products, but burdened out-of-state producers in ways that distorted the market and deprived out of state businesses of competitive opportunities. The confusion caused by these two cases is widespread and has led to inconsistent results in several circuits, and within the Fourth Circuit. This case is an appropriate opportunity to harmonize these decisions and protect the "national free market." *Wyoming*, 502 U.S. at 469.

II

COURTS ARE DIVIDED ON THE COMMERCE CLAUSE SCRUTINY THAT THEY SHOULD APPLY TO THE RELATIONSHIP BETWEEN A CHALLENGED LAW AND PUTATIVE LOCAL BENEFITS

A. Lower Courts Are Split on Whether They Should Defer to States Under the *Pike* Balancing Test

The Dormant Commerce Clause doctrine forbids states from engaging in explicit discrimination against out-of-state businesses. But, recognizing that legislatures often enact protectionist measures under the pretext of a legitimate exercise of police powers, this Court has repeatedly held that the judiciary cannot confine its analysis to a challenged statute's mere assertion of valid purposes. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (citation omitted) (a court is not bound by" '[t]he name, description or characterization given [a statute] by the legislature or the courts of the State,' but will determine for itself the practical impact of the law."); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) ("The principal

focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.").

This Court has consistently required lower courts to engage in meaningful scrutiny of a state's justifications for the economic regulations challenged as restrictions on interstate commerce: "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.*, 311 U.S. at 455-56. This means courts cannot be satisfied with the type of deference more typical of the rational basis analysis in due process and equal protection cases.[5] Instead, the precedent calls for a realistic assessment both of the intent and effects of statutes that burden interstate commerce.

The *Pike* test requires courts to weigh a challenged law's burdens on interstate commerce against the benefits to local interests that the state asserts in defense of that law. 397 U.S. at 142. Yet such balancing is not logically possible if courts must simultaneously accept uncritically a state's claims that the law advances an important state interest. That kind of deference would mean the practical abandonment of any real balancing, since the "local benefits" prong of the test would depend on the state's say-so. *Pike*'s balancing test would then be reduced to the functional equivalent of rational basis scrutiny.

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[5] Rational basis deference is so extreme that one judge has jocularly but accurately characterized it as "invit[ing] us to cup our hands over our eyes and then imagine if there could be anything right with the statute." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

This Court has resisted attempts to water down the *Pike* standard, both because of the ingenuity of state legislatures in erecting barriers against interstate competition, and because legislatures themselves may not be fully aware of the anticompetitive consequences of their own legislation. Since non-residents are not represented in state legislatures, lawmakers might be persuaded by in-state interests to enact legislation that happens to create a barrier against trade across state lines. These possibilities have led the Court to "eschew[] formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Because "the result" in Dormant Commerce Clause cases "turns on the unique characteristics of the statute at issue and the particular circumstances in each case," *Boston Stock Exch.*, 429 U.S. at 329, courts cannot satisfy their duty by applying deferential scrutiny.

Unfortunately, because the court below followed *Exxon*, it deferred almost without question to Maryland's assertions that the ban on corporate ownership of funeral homes benefits the general public. While admitting that there was very little evidence in the record to explain the law's purpose, *Brown*, 561 F.3d at 367, it took the route of rational basis-style deference, and relied solely on Maryland's "assert[ions]" that the restriction improved accountability, and the "claim" by existing, protected Maryland funeral directors, "that unlicensed individuals and corporations would be less accountable." *Id.* The panel was satisfied by the defendants' bare assertions that the restriction serves the public good - matters for which no actual evidence was adduced. *Id.*

Although the court did not cite any Dormant Commerce Clause decisions to support its deferential approach,[6] other courts have taken a similarly lenient view toward laws challenged under the Dormant Commerce Clause, accepting at face value a state's assertion that a challenged law serves important state purposes. As petitioners have explained, the First, Fifth, Ninth, and D.C. Circuits defer to a state's assertion that a challenged regulation provides public benefits, *see, e.g.*, *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007), *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005), *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005), while the Second, Third, Eighth, and Tenth Circuits have refused to apply deferential scrutiny, and require instead that a challenged law actually produce the intended local benefits if it is to survive the applicable balancing test. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 52 (2d Cir. 2007); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002); *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002); *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999).

This case represents only the most recent iteration of a growing circuit split on this issue. *See further* James D. Fox, *Note: State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause:*

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[6] The court did cite *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), but *Powers* was an equal protection and due process case, not a Commerce Clause case. Moreover, that case is in conflict with decisions by the Sixth and Ninth Circuits. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

Putative or Actual?, 1 Ave Maria L. Rev. 175, 198-204 (2003). Setting the circuits straight is vital to the continuing significance of the Dormant Commerce Clause doctrine.

B. Rational Basis Scrutiny Would Be Inappropriate in the Dormant Commerce Clause Context

Like the rational basis test itself, such deference would be supremely formalistic. Because courts use it to uphold laws so long as the state articulates even speculative justifications for those laws, the rational basis test can be met even when there is no evidence that the law actually serves the asserted purpose. *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (citations omitted, internal quotation marks omitted) ("the Government has no obligation to produce evidence or empirical data to sustain the rationality of a statutory classification and instead can base its statutes on rational speculation"). This means in practice that states need merely offer some barely rational purpose for their actions to satisfy judicial review.

If "formalism" means a judicial fixation on words and on the ingenious technicalities of legal procedure to the exclusion of the practical realities of the world, *see* Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 607 (1908), then rational basis style deference is the most extreme kind of formalism. This is why Justice Stevens characterized rational basis as "tantamount to no review at all," *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993), and why the Court acknowledged in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992), that if "the test . . . is whether the legislature has recited a

harm-preventing justification for its action . . . this amounts to a test of whether the legislature has a stupid staff."

Whatever the merits of such an approach in the context of due process and equal protection cases, it cannot be proper in the realm of Dormant Commerce Clause doctrine, where the federal judiciary has repeatedly pledged itself to avoiding formalism and instead seriously policing the freedom of commerce. As the Court noted fifty years ago, "[w]hat lifts the [dormant commerce clause] from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences." *Joseph*, 330 U.S. at 433.

The problem with a formalistic approach is that it is easily evaded with a wink and a nod. *Cf. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 301 n.4 (2001) ("[I]f formalism were the sine qua non . . . the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling."). In fact, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951), the Court made a point of differentiating Dormant Commerce Clause scrutiny from the rational basis deference applied in due process cases. If the Court were to uphold a state commercial regulation against a Dormant Commerce Clause challenge "simply because it professes to be a health measure" or other legitimate state action, the Commerce Clause would "impose[] no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate

goods." *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 476 n.2 (1981) (opinion of Powell, J.).

The Court should grant certiorari to reaffirm that in Dormant Commerce Clause cases, courts should not defer to a state's mere assertions that a challenged law serves important public purposes. To do so would hollow out the *Pike* test, since a state's mere assertion of public benefits would bar courts from balancing those benefits against forbidden protectionist effects and would thereby overtake the rest of the analysis. Given the large number of cases from different circuits divided over this point, certiorari is not only warranted but overdue. Lower courts need instruction on whether to defer to a state's assertion that its burdens on interstate commerce are so vital to important local interests as to survive the *Pike* balancing test.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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Respectfully submitted,

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